Supreme Court, U.S.
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991956 JUN 5 - 2000

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No. _____

In The

Supreme Court of the United States

CITY OF SIOUX CENTER, IOWA,

Petitioner,

versus

RURAL WATER SYSTEM #1, an Iowa Non-Profit Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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202 pp

QUESTION PRESENTED

1. Whether under 7 U.S.C. § 1926(b) which protects a rural water provider's territory only to the extent its service territory is established by state law, and the state statute defining service territory has never been construed by the state's courts, federal trial and appellate courts violate the Tenth Amendment by refusing to use available procedures to certify the question of the service area's definition to a state highest court for determination?

PARTIES TO THE PROCEEDING

Petitioner

City of Sioux Center, Iowa, is a municipal corporation (local government of a city) existing under the laws of Iowa and will generally be referred to as "Sioux Center" or "the City." As one of its municipal services Sioux Center operates a water utility.

Respondent

Rural Water System #1, an Iowa Non-Profit Corporation, is a non-profit corporation organized under Iowa Code chapter 504A and will generally be referred to as "Rural Water". Rural Water provides water to customer members.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT FOR GRANTING WRIT 6

Federal courts violate the Tenth Amendment when under 7 U.S.C. § 1926(b) which protects a rural water provider's territory only to the extent its service territory is established by state law, and the state statute defining service territory has never been construed by the state's courts, if federal trial and appellate courts refuse to use available procedures to certify the question of the service area's definition to state high courts determination 6

CONCLUSION 16

APPENDICES

Appendix A

Eighth Circuit Decision, January 26, 2000 .....App. 1

Appendix B

Eighth Circuit Order, February 23, 1999 .....App. 9

TABLE OF CONTENTS – Continued

Page

Appendix C

Memorandum Opinion and Order Regarding Cross-Motions for Summary Judgment, May 27, 1997 .....App. 10

Appendix D

Order Regarding Defendant's Motion for Reconsideration, June 23, 1997.....App. 111

Appendix E

Memorandum Opinion and Judgment, November 12, 1998.....App. 116

Appendix F

Eighth Circuit Order (denying rehearing), March 2, 2000.....App. 178

TABLE OF AUTHORITIES

Page

Federal Cases

Acadia Insurance Co. v. McNeil, 116 F.3d 599 (1st Cir. 1997) 10

All State Insurance Co. v. Clohessy, 199 F.3d 1293 (11th Cir. 2000) 10

American Home Ins. Co. v. Stephens, 140 F.3d 617 (5th Cir. 1998) withdrawing opinion at 130 F.3d 123 (5th Cir. 1997) 13

Boston Car Co. v. Acura Automobile, 971 F.2d 811 (fn. 1, 1st Cir. 1992) 12

Elkins v. Moreno, 435 U.S. 647 (1978) 13

Goldstein v. Potomac Electric Power Co., 578 F.2d 975 (4th Cir. 1978) 11

Lee v. Wheeler, 810 F.2d 303 (D.C. Cir. 1987) 11

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 13

Massachusetts v. Feeney, 429 U.S. 66 (1976) 10

National Bank of Washington v. Pearson, 863 F.2d 322 (4th Cir. 1988) 12

New York v. United States, 505 U.S. 144 (1992) 14

Nievers v. University of Puerto Rico, 7 F.3d 270 (1st Cir. 1993) 12

Perkins v. Clark Equipment Co., Melrole Division, 823 F.2d 207 (8th Cir. 1987) 8

Sequoyah County Rural Water District No. 7 v. Town of Muldrow, 191 F.3d 1192 (10th Cir. 1999) 14

Storts v. Hardee's Food Systems, Inc., ___ F.3d ___ (10th Cir., No. 98-3320, April 6, 2000) 2000 U.S.App. LEXIS 6307 10

TABLE OF AUTHORITIES – Continued

Page

Stringer v. Cendant Mortgage Corp., 199 F.3d 190 (5th Cir. 1999) 10

United States v. Morrison, 529 U.S. ___ (Nos. 99-5 and 99-29, May 15, 2000) 11

United States v. Lopez, 514 U.S. 549 (1995) 11

Vitanza v. The Upjohn Company, ___ F.3d ___ (Docket No. 99-7539 May 5, 2000) 2000 U.S.App. LEXIS 8928 10

Yang v. City of Chicago, 198 F.3d 630 (7th Cir. 1999) 10

FEDERAL STATUTES

7 U.S.C. § 1926(b) 2, 4, 6, 11

28 U.S.C. §§ 1254(1), 2101(c) and 2106 1

U.S. Const. Amend. X 2, 10, 11, 12, 15

STATE STATUTES

Iowa Code § 354.9 15

Iowa Code § 357.1 14

Iowa Code § 357A 6

Iowa Code § 357A.2 ..... *passim*

Iowa Code § 357A.21 15

Iowa Code § 357A.23 15

Iowa Code § 358C.3(9) 15

Iowa Code § 358C.12(7) 15

Iowa Code § 368.1 15

TABLE OF AUTHORITIES – Continued

Page

Iowa Code § 368.7 15
Iowa Code § 368.17 15
Iowa Code § 403.17(3) 15
Iowa Code § 414.23 15
Iowa Code § 499.5(3) 14
Iowa Code chapter 357A 15
Iowa Code chapter 504A ..... *passim*
Iowa Code chapter 684A 7, 12
Iowa R. App. Pro. 451-459 12

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 202 F.3d 1025 (8th Cir. 2000). A copy of the Opinion is included at Appendix A, page 1. The Court of Appeals' order denying rehearing is unpublished, but is included at Appendix F, page 177. The ruling of the United States District Court for the Northern District of Iowa is reported at 29 F.Supp. 2d 975 (U.S. N.D. Iowa 1998) and is included at Appendix E, page 116. The trial court's order regarding the initial ruling on summary judgment is reported at 967 F.Supp. 1483 (U.S. N.D. Iowa 1997) and is included at Appendix C, page 10. The trial court's order denying certification to the Iowa Supreme Court is not reported but is included at Appendix B, page 9.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on January 26, 2000. (Appendix A). On February 7, 2000 Petitioner filed a timely Petition for Rehearing by Panel and Petition for Rehearing en Banc. The United States Court of Appeals for the Eighth Circuit denied the Petition for Rehearing by Panel and for Rehearing en Banc on March 7, 2000. (Appendix F). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Motion for Rehearing by Panel and for Rehearing en Banc. The Court's jurisdiction is sought under 28 U.S.C. §§ 1254(1), 2101(c) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. X.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

7 U.S.C. § 1926(b) Water and Waste Facility Loans and Grants.

> (b) Curtailment or limitation of service prohibited
>
> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area serviced by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Iowa Code § 357A.2 (¶ 4-5) Petition – deposit – limitation.

> Water services, other than water services provided as of April 1, 1987, shall not be provided within two miles of the limits of a city by a rural water district incorporated under this chapter or chapter 504A except as provided in this section.
>
> A rural water district incorporated under this chapter or chapter 504A may give notice of

intent to provide water service to a new area within two miles of a city by submitting a water plan to the city. The plan is only required to indicate the area within two miles of the city which the rural water district intends to serve. If the city fails to respond to the rural water district's plan within ninety days of receipt of the plan, the rural water district may provide service in the area designated in the plan. The city may inform the rural water district within ninety days of receipt of the plan that the city requires additional time or information to study the question of providing water service outside the limits of the city. If additional time or information is required, the city shall respond to the rural water district's plan within one hundred eighty days of receipt of the plan. In responding to the plan, the city may waive its right to provide water service within the areas designated for service by the rural water district, or the city may reserve the right to provide water service in some or all of the areas which the rural water district intends to serve. If the city reserves the right to provide water service within some or all of the areas which the rural water district intends to serve, the city shall provide service within four years of receipt of the plan. This section does not preclude a city from providing water service in an area which is annexed by the city.

STATEMENT OF THE CASE

Under 7 U.S.C. § 1926(b) the water service territory of rural water providers indebted to the United States is protected from encroachment by cities. Rural Water, a not for profit corporation organized under Iowa Code chapter 504A, became indebted to the United States on July 1, 1992. Thus, whatever Rural Water's service area was on July 1, 1992 is protected from any city providing water service in the area. After Rural Water became indebted to the United States, Sioux Center extended water service to three houses outside its 1992 boundary but within two miles of the boundary as it stood on July 1, 1992. On November 2, 1995, Rural Water filed a Complaint, later amended, against Sioux Center alleging it violated 7 U.S.C. § 1926(b) by providing water service to customers both within Sioux Center's July 1, 1992, boundary and also to customers located within two miles of the City's boundary. Sioux Center denied violating federal law and maintained it was providing water service within its legal service area as defined by Iowa Code § 357A.2 and that Rural Water had no right to provide service within two miles of Sioux Center's July 1, 1992 boundary without Sioux Center's permission. In simple terms, the issue in this case is this: if Iowa Code § 357A.2 applies to Rural Water as a corporation organized under Iowa Code chapter 504A, then Sioux Center did not violate federal law by extending service to customers within two miles of its boundary because that area is not within Rural Water's service territory. No Iowa appellate court has ever decided this issue.

The parties filed cross motions for summary judgment. The trial court correctly held that as a matter of

federal law the determination of service area is controlled by state law. The trial court also held Iowa Code § 357A.2 does not apply to corporations organized under Iowa Code chapter 504A. App. 96-103. The trial court in addition held Sioux Center has the right to serve customers who were within its boundaries on July 1, 1992. The court reserved for trial the question of the extent of Rural Water's physical ability to serve the area outside Sioux Center's July 1, 1992, city limits.

Sioux Center filed a motion asking the court to reconsider its ruling regarding § 357A.2 or, alternatively, to certify the question whether § 357A.2 applies to corporations existing under chapter 504A to the Iowa Supreme Court. The trial court affirmed its prior ruling and declined to certify the question. App. 114-115.

Trial was held May 11, 12, 13 and 14, 1998, with oral argument held on the transcribed record on October 29, 1998. The court entered its ruling and judgment was entered on November 12, 1998. App. 176-177. Notice of Appeal was filed with the Eighth Circuit and docketing fees paid on December 10, 1998.

While appeal was pending before the Eighth Circuit, and before briefs were due, Sioux Center again moved to have the meaning of Iowa Code § 357A.2 certified as a question of law to the Iowa Supreme Court. The Court of Appeals deferred consideration of the request to the submission of the appeal. App. 9. In its ruling on the merits, the Court of Appeals did not certify the question of the meaning of Iowa Code § 357A.2 to the Iowa Supreme Court. The Court of Appeals, in a footnote, found such submission unnecessary. The Court of Appeals affirmed

the trial court ruling that Iowa Code § 357A.2 does not apply to corporations organized under Iowa Code chapter 504A. In order to reach its conclusion the Court of Appeals excised the words "or chapter 504A" from Iowa Code § 357A.2 without citation to any Iowa authority. Sioux Center filed a motion for reconsideration and again requested that the Court of Appeals certify the question of the meaning of Iowa Code § 357A.2 to the Iowa Supreme Court. The Court denied the motion. This Petition followed.

ARGUMENT FOR GRANTING WRIT

Federal courts violate the Tenth Amendment when under 7 U.S.C. § 1926(b) which protects a rural water provider's territory only to the extent its service territory is established by state law, and the state statute defining service territory has never been construed by the state's courts, if federal trial and appellate courts refuse to use available procedures to certify the question of the service area's definition to state high courts for determination.

This case, although properly in federal court, and governed by federal statute, turns on a point of state law: Does the prohibition in Iowa Code § 357A (which reads in part, "Water services, other than water services provided as of April 1, 1987, shall not be provided within two miles of the limits of a city by a rural water district incorporated under this chapter or chapter 504A except as provided in this section.") include corporations organized under Iowa Code chapter 504A? The question of the

meaning of Iowa Code § 357A.2 is one of Iowa law. There are not any Iowa cases concerning whether the limitations contained in Iowa Code § 357A.2 apply to corporations organized under Iowa Code chapter 504A. Despite repeated requests, and an easy procedure for obtaining an answer (*See*, Iowa Code chapter 684A, Iowa R. App. Pro. 451-459, regarding certified question from federal courts) no Iowa Court has been asked to decide for Iowa citizens the meaning of the controlling Iowa law.

The question presented in this case relates directly to the meaning and extent of federalism. Does the Tenth Amendment merely limit the extent of the legislative power of Congress, or does it also impact the judicial power of the United States?

The pivotal question in this case before the trial court and the Court of Appeals was whether the prohibition in Iowa Code § 357A.2 which precludes water service within two miles of cities without the City's permission,[1] applies to corporations organized under Iowa Code chapter 504A, including Rural Water. The pivotal question for purposes of certiorari is who is to make the determination of the meaning of the controlling Iowa law? Do considerations of federalism dictate that certain questions must be certified to state courts for decision?

Sioux Center initially made a motion in the trial court requesting certification to the Iowa Supreme Court of the question of whether Iowa Code § 357A.2 applies to corporations organized under Iowa Code chapter 504A. Sioux

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[1] Rural Water does not have permission to serve within the two mile area around Sioux Center.

Center made this motion after the district court determined the meaning of § 357A.2 as part of its ruling on the cross motions for summary judgment. The trial court rejected the request for certification because it came only after an adverse ruling on the question of state law. "The City," said the trial court, "is not entitled to a second bite at the apple via certification of questions after this court has rendered a decision . . . " App. 115.

On appeal Sioux Center moved, prior to submission of briefs, for certification of the controlling question of state law. By order dated February 23, 1999, the Court of Appeals directed the question of certification be submitted for disposition with the case on the merits. App. 9. The Court of Appeals dealt with the request for certification of the controlling question of Iowa law in footnote 6 of its opinion:

> We deny the motion because we think this is not a particularly appropriate case for certification and because appellants should be discouraged from the practice of asking for certification after an adverse judgment has been rendered. *See Perkins v. Clark Equip. Co., Melrole Div.*, 823 F.2d 207, 209-10 (8th Cir. 1987).

The Court makes two points. First, that the case is not appropriate for certification and second that parties should be discouraged from asking for certification after an adverse judgment. For purposes of certiorari analysis these points are most easily examined in reverse order.

1. An initial decision by a federal court should not preclude certification of controlling questions of state law in light of the federalism inherent in the Tenth Amendment.

Sioux Center filed a motion for summary judgment which raised issues of both federal and state law before the trial court. The issues of federal law were not settled when the motion was filed. Only after the trial court resolved the federal law issues as to the meaning of federal law did the controlling nature of Iowa law become manifest. The trial court ruled on the meaning of Iowa Code § 357A.2 as part of its ruling on summary judgment. Sioux Center then asked for reconsideration and requested (within the time allowed by Iowa rules for appeal) that the controlling question of state law be certified to the Iowa Supreme Court. In this regard, the request was directly analogous to a request to treat the controlling question like an appeal to the Iowa Supreme Court. The Iowa Supreme Court has never construed Iowa Code § 357A.2. Had the trial court certified the controlling question of Iowa law to the Iowa court, the issue of the meaning of Iowa Code § 357A.2 would have been decided by the Court, which under our federal system has the ultimate right under the Tenth Amendment to decide the meaning of Iowa law.

Sioux Center renewed its request for certification after appeal to the Eighth Circuit and prior to submission of the case. The Court of Appeals deferred its decision and addressed the issue only in footnote 6 as set out above. The reluctance to certify is even more curious on appeal because on appeal the primary and controlling issue in the case was no longer federal law, but the

meaning of a state statute. Part of the logical mandate enshrined in the Tenth Amendment is a recognition of the right of the people, through their state governments, to have their own state legal systems. Failure to certify under such circumstances ignores the existence of that separate state legal system.

The Eighth Circuit is not alone in refusing to certify controlling questions of state law to state courts once the federal courts have made an initial determination as to the meaning of state law. The Tenth Circuit takes a similar position. *Storts v. Hardee's Food Systems, Inc.*, ___ F.3d ___ (10th Cir., No. 98-3320, April 6, 2000) 2000 U.S. App. LEXIS 6307.

Nevertheless, it is not unusual in this country for federal courts to certify questions of state law to state high courts. This Court has certified a determinative question of state law which was without controlling state precedent to a state supreme court. *Massachusetts v. Feeney*, 429 U.S. 66 (1976). Similarly, the First Circuit has noted that "considerations of federalism" are among the factors which compelled it to certify certain questions to state supreme courts. *Acadia Insurance Co. v. McNeil*, 116 F.3d 599, 605 (1st Cir. 1997). The Second Circuit has also noted considerations of federal and state balance as a consideration in certifying a question to the Connecticut Supreme Court. *Vitanza v. The Upjohn Company*, ___ F.3d ___ (Docket No. 99-7539 May 5, 2000) 2000 U.S. App. LEXIS 8928. Other Courts of Appeal have found it appropriate to certify controlling and unresolved questions of state law to highest court of a state. *All State Insurance Co. v. Clohessy*, 199 F.3d 1293, 1295 (11th Cir. 2000), *Stringer v. Cendant Mortgage Corp.*, 199 F.3d 190 (5th Cir. 1999), *Yang*

v. City of Chicago, 198 F.3d 630 (7th Cir. 1999), *Lee v. Wheeler*, 810 F.2d 303 (D.C. Cir. 1987), *Goldstein v. Potomac Electric Power Co.*, 578 F.2d 975, 978 (4th Cir. 1978).

This Court has shown respect for the federalism embodied in the Tenth Amendment. Most recently, this Court has recognized that the Commerce Clause cannot be used to obliterate the distinction between national and state authority. *United States v. Morrison*, 529 U.S. ___ (Nos. 99-5 and 99-29, May 15, 2000) citing *United States v. Lopez*, 514 U.S. 549 (1995). Clearly. Iowa has the greatest interest in the meaning of its own laws. It would seem to follow that as Congress cannot use its general powers to impair the reserved legislative power of the states, the Courts cannot, consistent with the Tenth Amendment, use the general judicial powers of the United States to avoid deference to the reserved judicial power of the states. Where Congress has in fact recognized that certain rights only arise under state law, as it did with 7 U.S.C. § 1926(b), then the Courts have an equal obligation to defer to the judicial power of the states to declare their own law. To be meaningful the Tenth Amendment must limit both the legislative and judicial power of the United States and implies a requirement that certain decisions are reserved to state courts.

The present case is an example of where the federal courts under the Constitution should have certified a question of state law to the state high court. At the time of initial hearing on the motion for summary judgment federal law on the controlling nature of state law under 7 U.S.C. § 1926(b) was not settled. It was not clear that trial court would follow the then limited precedent that the question of protected service area would be controlled by

state law. Before the federal issue was resolved the state law question was not ripe. This is not a diversity case. Sioux Center did not select a federal forum, and did not have any opportunity prior to federal litigation to have the state law issue resolved by Iowa courts. *See, National Bank of Washington v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988) and *Nievers v. University of Puerto Rico*, 7 F.3d 270, 278 (1st Cir. 1993) regarding forum shopping on state law questions. Moreover, there was a request to the trial court for certification of the unresolved and controlling question of Iowa. *See, Boston Car Co. v. Acura Auto.*, 971 F.2d 811, 817 (fn. 3, 1st Cir. 1992).

Both the trial court and Court of Appeals refused to certify the controlling and never resolved question of the meaning of Iowa Code § 357A.2. Requests were made to the trial court before trial and to the Court of Appeals prior to briefing as well as on motion for rehearing. The position of the Eighth and Tenth Circuits appears to be that a party having gambled on the federal courts cannot have state courts review the controlling state law issues upon which those courts have never ruled. However, state appellate courts exist in part to review questions of state law. From either the trial court or the Court of Appeals a question could have been certified to the Iowa Supreme Court and reviewed in the normal course of its jurisdiction. Iowa Code chapter 684A, Iowa R. App. Pro. 451-459. Such a process would result in a controlling decision of state law on the controlling issue in an orderly manner with due deference to the judicial power of the states as derived from the Tenth Amendment.

This Court has certified a question of Maryland law which was controlling on an issue of federal law, but

unresolved by the Maryland Supreme Court to that Court for determination. *Elkins v. Moreno*, 435 U.S. 647 (1978). If such a certification is not to be made when federal courts have decided state law, then the federal courts would be insulated from authoritative review on controlling questions of state law and federalism would be undermined because parties would then be deprived of truly meaningful appellate review on the questions which control their rights. One of the principles of our law is that people are entitled to meaningful appellate review. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). With all due respect, the present rule of the Eighth and Tenth Circuits leaves a nagging suspicion that refusal to allow state court review of controlling state law issues has more to do with avoiding reversal of federal judges by state supreme courts than with the orderly administration of justice in a federal system. Here at both trial and appellate levels ample opportunity existed to receive authoritative review from the state court. In such circumstances considerations of federalism dictate that such a review by way of certified question should have been had.

Upon these points, moreover, there is at least a split in attitude among the circuits. The Fifth Circuit has been willing to withdraw one of its own opinions on the meaning of a controlling and undecided point of Texas law and certify that question to the Supreme Court of Texas. *American Home Ins. Co. v. Stephens*, 140 F.3d 617 (5th Cir. 1998) withdrawing opinion at 130 F.3d 123 (5th Cir. 1997). It is the Fifth Circuit which has taken the constitutionally proper course, not the Eighth Circuit.

2. This case illustrates why review by state high courts through certified question is appropriate.

The Iowa Supreme Court has never decided if Iowa Code § 357A.2 applies to a 504A corporation. If § 357A.2 applies, then Rural Water had no right to serve in the area in dispute and the case must be reversed because Sioux Center never invaded Rural Water's protected water service territory.

Both the trial court and Court of Appeals found that corporations organized under Iowa Code chapter 504A were not covered by Iowa Code § 357A.2. In reaching its conclusion the Court of Appeals rejected the reasoning of the trial court. App. 5. However, the Court of Appeals was only able to reach its decision by excising from Iowa Code § 357A.2 the words "or chapter 504A". It did not cite any Iowa case in support of this result. Instead the Court looked to a Tenth Circuit decision holding that doubts in rural water questions should be resolved in favor of protecting service areas. App. 6-7, citing *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir. 1999). Thus, a federal rule of construction was used to excise words from a state statute, when it is state law construction of the state statute which under the Constitution should prevail. As Congress is not allowed by this Court to dictate the form of state law, it would seem to follow that the courts cannot impose federal meaning on state statutes through use of federal judicial power, especially where that imposition of federal meaning lacks any basis in state law. *See, New York v. United States*, 505 U.S. 144, 177 (1992).

Moreover, both the ruling of the trial and Appeals Court undermine Iowa law and policy. Under Iowa law there are four types of rural water providers. All four are mentioned in statutes which prohibit service within two miles of cities without city permission. *See,* Iowa Code §§ 357.1, 357A.2, 499.5(3). The decisions in this case remove one of these types of providers from comprehensive regulation by the state. Moreover, the two mile control zone for water service is part of a general scheme of Iowa law giving cities development control over the area within two miles of their boundaries. *See,* Iowa Code §§ 354.9 (subdivision control), 358C.3(9) and 358C.12(7) (real estate improvement districts), 368.1, 368.7 and 368.17 (incorporation of new cities and annexation), 403.17(3) (urban renewal) and 414.23 (zoning). Moreover, in chapter 357A itself the Iowa legislature has used the language excised from § 2 to, among other things, assure compensation to corporations organized under Iowa Code chapter 504A and allow franchises to be issued to such corporations for long enough periods to secure financing. Iowa Code §§ 357A.21 and 357A.23. Clearly, there is reason to believe the trial and Appeals courts were wrong on the meaning of Iowa Code § 357A.2. But, in terms of federalism theirs was not the authority which should ultimately have decided the meaning of Iowa law. It is Iowa which has the greatest interest in the integrity of the policies embodied in its laws. Respect for federalism and the rights reserved under the Tenth Amendment require that these issues be referred to Iowa courts, and that the Tenth Amendment be recognized not only as a limitation on the legislative power of the United States,

but also a limitation on the judicial power of the United States.

CONCLUSION

Granting a writ of certiorari in this case would give the Court an opportunity to establish standards for recognition of the reserved judicial power of the states by adoption of rules which will guide federal courts in determining when controlling and unresolved questions of state law should be certified to state courts for decision. Granting certiorari will also allow this court to rectify the disturbance to federalism which has been engendered by present practice in regard to certifying controlling questions of unresolved state law to state high courts.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-4160
No. 99-2005

Rural Water System #1, an Iowa Non-Profit Corporation, Appellee, v. City of Sioux Center, Iowa, Appellant.	* * * * * * * *	Appeals from the United States District Court for the Northern District of Iowa.

Submitted: December 15, 1999

Filed: January 26, 2000

Before BEAM and HEANEY, Circuit Judges, and KYLE,[1] District Judge.

BEAM, Circuit Judge.

The City of Sioux Center, Iowa, appeals the district court's decision that it violated 7 U.S.C. § 1926(b) by curtailing the service area of Rural Water System #1 (RWS #1). Sioux Center also appeals the district court's decision

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[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota, sitting by designation.

to award RWS #1 attorney fees. We affirm in part and reverse in part.

I. BACKGROUND

RWS # 1 is a nonprofit corporation organized under chapter 504A[2] of the Iowa Code that provides water to rural customers. It furnishes service in an area that is eighteen miles by thirty-six miles surrounding Sioux Center.[3] RWS # 1 brought suit against Sioux Center under section 1983 and the Declaratory Judgment Act alleging a violation of 7 U.S.C. § 1926(b). Section 1926(b) prevents municipalities from curtailing the service area of rural water service providers who are indebted to the United States. RWS # 1 claimed that Sioux Center had encroached on its service area by providing water to customers outside of Sioux Center's city limits. RWS # 1 also asserted that Sioux Center violated section 1926(b) when it traded one of its water customers for one of RWS # 1's customers. The parties filed cross-motions for summary judgment.

In the district court's ruling on these motions, it determined that RWS # 1 fell under the protection of section 1926(b) on July 1, 1992, when RWS # 1 took out a

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[2] Chapter 504A is the Nonprofit Corporation Act of Iowa. It allows all types of nonprofit entities to incorporate including churches, charities, and schools. It does not have any specific rules for water districts or even utility providers generally.

[3] For a drawing depicting the service area see *Rural Water System # 1 v. City of Sioux Center*, 29 F. Supp. 2d 975, 983 (N.D. Iowa 1998) (*RWS # 1 II*).

loan from the Farm Home Administration[4] (FmHA). *See Rural Water System # 1 v. City of Sioux Center*, 967 F. Supp. 1483, 1524 (N.D. Iowa 1997) (*RWS # 1 I*). The district court also held that the applicable test for a section 1926(b) violation is whether the water provider has "made service available" to the disputed customers. *See id.* at 1524-25. Making service available has two components: (1) the physical ability to serve an area;[5] and (2) the legal right to serve an area. *See id.* at 1527-28. In its summary judgment ruling, the district court held that RWS # 1 had the legal right to serve the area in question, and left the physical ability to serve as an issue for trial. *See id.* at 1533.

After a bench trial, the district court found that Sioux Center had violated section 1926(b) with respect to four customers. Sioux Center had encroached on RWS # 1's service area by providing water to three customers RWS # 1 had both the physical ability and legal right to serve. The court also found that Sioux Center had violated section 1926(b) by trading customers.

Sioux Center appeals, contending that under Iowa law RWS # 1 did not have the legal right to serve the three customers. Sioux Center also contends that the trading of customers does not violate section 1926(b).

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[4] We note that the FmHA is now know as the Rural Utilities Service. *See* 7 C.F.R. § 1780.3(a). We, however, will continue to refer to it as the FmHA to avoid confusion.

[5] This is sometimes referred to as the pipes-in-the-ground test.

II. ANALYSIS

A. The Legal Right to Serve

On appeal, the parties argue that interpretation of Iowa law, specifically section 357A.2 of chapter 357A, controls the outcome of this case.[6] The statute reads:

> Water services, other than water services provided as of April 1, 1987, shall not be provided within two miles of the limits of a city by a rural water district incorporated under this chapter or chapter 504A except as provided in this section.

Iowa Code § 357A.2 (1992). The district court found that this section was not applicable to RWS # 1 because it is simply the operator of a water system and is not a water "district," and, therefore, RWS # 1 had the legal right to serve the three customers who were within two miles of the city limit. *See RWS # 1 I*, 967 F. Supp. at 1533; *RWS # 1 II*, 29 F. Supp. 2d at 991-92. We agree.

Under Iowa law, rural water providers can choose to be organized in a variety of ways. A water vendor can be: (1) a cooperative association under chapter 499; (2) a nonprofit corporation under chapter 504A; (3) a benefitted water district under chapter 357; or (4) a rural water district under chapter 357A. Each chapter furnishes both

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[6] Sioux Center has made a motion requesting certification of this question of interpretation to the Iowa Supreme Court. Sioux Center made this motion after the district court determined the meaning of section 357A.2. We deny the motion because we think this is not a particularly appropriate case for certification and because appellants should be discouraged from the practice of asking for certification after an adverse judgment has been rendered. *See Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 209-10 (8th Cir. 1987).

the organizational and governing rules for the entity. RWS # 1 chose to organize under chapter 504A as a nonprofit corporation. At issue is whether specific provisions of chapter 357A also apply to water providers organized under chapter 504A.

Section 357A.1 defines "district" for the purposes of chapter 357A as "a rural water district incorporated and organized pursuant to the provision of *this chapter*." Iowa Code § 357A.1 (1991) (emphasis added). Thus, the term "district," as written in section 357A.2, does not include providers organized under chapter 504A. Additionally, there is no separately defined entity which is a 504A rural water "district" because an entity organized under chapter 504A is simply a nonprofit corporation. Properly interpreting section 357A.2, in light of the definition given in 357A.1, requires us to cut the "or chapter 504A" language out of the statute because a 504A corporation is clearly not a "district" within the meaning of section 357A.1. If we leave the "or chapter 504A" language in the statute the sentence is definitionally incorrect because "rural water district" modifies both "this chapter" and "chapter 504A." Therefore, we find that the prohibition established by section 357A.2 does not apply to RWS # 1 because it is not a "district" within the meaning of the statute.

While we would prefer to construe the statute without excising words, not to do so requires us to find, without supporting statutory language, that RWS # 1 is a "district" as described by section 357A.2. This result would require us, in essence, to add the words "or chapter 504A" into the section 357A.1 definition. So, as can be seen, there is no clean cut approach to the problem.

The surplusage problem probably can be explained by looking at the history of another section in the same chapter, section 357A.20. This section allows a rural water corporation organized under chapter 504A to reincorporate under chapter 357A. *See* Iowa Code § 357A.20 (1994). Under the 1987 version of the section, a water provider could be both a 504A corporation and a 357A water district after reincorporation. It is likely that section 357A.2 applied to these corporations having dual status. In 1991, however, section 357A.20 was amended, and now when a 504A corporation reincorporates as a 357A district, the 504A corporation ceases to exist upon filing the notice of reincorporation. At that point, the entity is only a 357A district.[7] *See* Iowa Code § 357A.20(1) & (2) (1992). Thus, the "or chapter 504A" language had meaning under the 1987 version of the code when water providers could have dual status. The amendment to the statute rendered this language unuseable and the Iowa legislature failed to strike the surplus words.

Finally, any "[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory."

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[7] The district court noted that the reincorporated entity continues to operate under all the 504A rules until its first annual meeting, and it is the districts in the transition process to which the statute applies. *See RWS # 1 I*, 967 F. Supp. at 1532-33. We disagree. Although the district may continue to operate under the bylaws and articles of incorporation of the 504A corporation, it is no longer a 504A corporation once it is reincorporated.

Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192, 1197 (10th Cir. 1999) (citations omitted). Congress enacted section 1926(b) to encourage rural water development and to provide greater security for FmHA loans. *See id.* at 1196. Therefore, our holding is supported by the policy underlying the federal statute.

B. The Customer Trade

Sioux Center also appeals the determination that the customer trade violated the statute. As previously noted, section 1926(b) prohibits a city from curtailing or limiting the area served by a rural water association in debt to the government. Additionally, 7 CFR § 1942.17(n)(2)(xii) requires the government's written consent before a "facility" can be sold, leased, transferred or encumbered. The parties agree that the customer traded is not a facility.

RWS # 1, however, argues by analogy that the statute and the regulation create a requirement that the government must consent to an exchange of customers or a violation of the statute will result. The district court found that neither the statute nor the regulation directly addressed the issue of customers or a trade of customers. *See RWS # 1 II*, 29 F. Supp. 2d at 990. The court did find, however, "the principles behind § 1926(b) do [prohibit a trade], at least where the FmHA is not a party to the agreement to transfer." *Id.* at 991. We disagree.

Although the statute was enacted to protect the government's security, the government's security was not impaired by this trade. It was an equal exchange of one customer for another. Therefore, the policy justification utilized by the district court to support its decision fails.

Accordingly, we reverse on this issue, and the city can continue to provide water to the traded customer.

C. Attorney Fees

RWS # 1 requested $377,516.61 in attorney fees under section 1988. The district court reduced this amount by forty-four percent, to $212,866.61 on the basis of partial success, excess hours, and duplication. We review an attorney fees award under section 1988 for an abuse of discretion. *See Harmon v. City of Kansas City*, 197 F.3d 321, 329 (8th Cir. 1999). Given the complicated facts of this case, and the district court's well-reasoned decision, we affirm the fee award.

III. CONCLUSION

Accordingly, the district court is affirmed in part and reversed in part.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-4160NISC

Rural Water System, #1, Appellee, vs. City of Sioux Center, Iowa, Appellant.	*	Appeal from the United States District Court for the Northern District of Iowa (Filed Feb. 23, 1999)

Appellant's motion for certification to state law question and appellees' response thereto are hereby ordered taken with the case for consideration by the panel to which this case is submitted for disposition on the merits.

February 23, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WESTERN DIVISION

RURAL WATER SYSTEM #1, an Iowa non-profit corporation, Plaintiff, vs. CITY OF SIOUX CENTER, IOWA, Defendant.	No. C 95-4112-MWB. **MEMORANDUM OPINION AND ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT** **(Filed May 27, 1997)**

This "turf war" is not between rival gangs over control of the distribution of some illegal substance in a disputed territory, but between such staid entities as a municipality and a non-profit corporation over distribution of a legal, commonplace, substance: water. Furthermore, the disputed "turf" is not some section of urban jungle; rather, it is an area bordering the city limits of a quiet rural Iowa town. Finally, the weapons in this "turf war" are not guns or knives, but legal arguments. For example, the parties assert that to determine who has the right to supply water in the disputed area, the court must examine issues as diverse and complex as the nature of the cause or causes of action the plaintiff asserts; the statute of limitations applicable to that action or those actions; the proper interpretation and the constitutionality of an obscure federal statute that provides certain protections to rural water associations from encroachment on their service areas by adjacent municipalities; preemption of state law by federal law; and the

applicability here of Iowa statutes defining service areas for various kinds of entities providing rural water services. Yet, however civilized the weapons of the combatants and unremarkable the substance each of the disputants wishes to supply, this "turf war" is as hard-fought as any other.

I. INTRODUCTION

Plaintiff Rural Water System #1 (RWS #1), a non-profit corporation, filed the original complaint in this lawsuit on November 2, 1995, against defendant City of Sioux Center, Iowa (the City), alleging generally violations of 7 U.S.C. § 1926(b), which protects rural water associations indebted to the United States from encroachment on their service areas by adjacent municipalities. RWS #1 filed an amended complaint on October 22, 1996, in which its claims are clarified somewhat. In the amended complaint, RWS #1's claims are alleged to arise pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, the Civil Rights Act, 42 U.S.C. § 1983, the Attorney's Fees Act, 42 U.S.C. § 1988, and state law. RWS #1's federal claims are premised on alleged violations of 7 U.S.C. § 1926(b) and "willful blindness resulting in bad faith" violation of § 1926(b). Its state-law claims assert tortious interference with customers, tortious interference with prospective business advantage, and conversion of property.

Rather more specifically, the statute RWS #1 contends the City has violated or is threatening to violate, 7 U.S.C. § 1926(b), prohibits "curtailment" or "limitation" of the service area of a rural water service association that is

indebted to the United States by inclusion of any portion of that service area within the boundaries of a municipal corporation. 7 U.S.C. § 1926(b). RWS #1's federal claims, as well as its state-law claims, allegedly arise from the City's annexation of portions of RWS #1's asserted service area, the City's demands that it, not RWS #1, supply the water needs of customers in the annexed areas and within two miles of the City's new boundaries, and the City's actual service to some of the customers in the disputed area, allegedly resulting in "curtailment" or "limitation" of RWS #1's service area.

As relief, RWS #1 requests preliminary and permanent injunctions prohibiting the City's alleged curtailment of RWS #1's service area in violation of 7 U.S.C. § 1926(b); declaratory judgment concerning the rights of the parties to serve the disputed area and alleged violations of state and federal law; equitable relief; damages, both compensatory and punitive; and attorney's fees and costs.

The City answered the original complaint on January 2, 1996, and the amended complaint on November 4, 1996. While the cross-motions for summary judgment now before the court were pending, the City moved and was granted leave to amend its answer to assert affirmative defenses that RWS #1's claims were barred by the running of the applicable statute of limitations and the doctrines of laches and waiver. The City's amended answer was filed on February 12, 1997.

The first of the cross-motions for summary judgment now before the court was filed by the City on January 10,

1997.[1] In that motion, the City asserts that RWS #1 can no longer assert the protections of 7 U.S.C. § 1926(b), because it was not indebted to the United States at the time of the annexation of disputed areas by the City. It contends, citing a recent decision of the Sixth Circuit Court of Appeals, that RWS #1's pay-off of its loans from the Farm Home Administration (FmHA) caused its protection under § 1926(b) to lapse.[2] The City contends

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[1] The City's motion for summary judgment was first only by hours. All of the cross-motions for summary judgment were filed on the same day, which, not surprisingly, was the deadline for dispositive motions.

[2] The decision upon which the City principally relies, now published, is *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38 (6th Cir.1996) ("*Scioto Water*"). Although *Scioto Water* is the only published decision of a federal circuit court of appeals either this court or the parties have found that considers directly one of the questions presented here – whether a party that has paid off or bought out its loans from the FmHA can still assert the protections of § 1926(b) – it is not even mentioned in RWS #1's opening briefs in support of RWS #1's motions for summary judgment. This omission is all the more odd, because not only was the decision of the Sixth Circuit Court of Appeals handed down on December 18, 1996, approximately three weeks before the present cross-motions for summary judgment were filed, but counsel for RWS #1 here was counsel for the defendants-appellees in the *Scioto Water* case. Nor can RWS #1's counsel's omission of the decision in *Scioto Water* be excused on the basis that the City had already brought the decision to this court's attention, because the City's and RWS #1's cross-motions for summary judgment were filed the same day. RWS #1's counsel thus had no assurance that the City's counsel would bring the *Scioto Water* decision to the court's attention.

It is hardly the issue that the rules of professional conduct require only the disclosure of *controlling* authority, *see, e.g.*,

further that the annexed area is not part of RWS #1's service area, nor is any area within two miles of the City's

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C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's view, the rules of professional conduct establish the "floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS #1's counsel's omission of the *Scioto Water* decision from RWS #1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS #1's position. RWS #1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS #1's position. This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS #1's position simply because it is adverse.

Although the impact of RWS #1's counsel's omission, as a practical matter, is slight, that is again hardly the issue. The issue, as the court sees it, is one of professionalism. Similarly, hardly the issue is RWS #1's counsel's rather self-serving assertion, when RWS #1's briefing eventually addressed the *Scioto Water* decision, that that decision should somehow be discounted, because it is "on appeal." The decision of the Sixth Circuit Court of Appeals is not "on appeal"; rather, a petition for certiorari has been filed with, but not yet granted by, the Supreme Court. *See* 65 U.S.L.W. 3666 (Mar. 18, 1997) (No. 96-1498). This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the strength

current city limits, by operation of Iowa law, which the City contends is not preempted by federal law. Finally, the City argues that RWS #1's interpretation of § 1926(b) as revivifying protection of its service area into the area properly annexed by the City and into the two-mile zone beyond those city limits violates the Tenth Amendment to the United States Constitution and expropriates public property for a private purpose in further violation of the Tenth Amendment. In further briefing, the City has also

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of their reasoning and analysis, which is the manner in which this court will consider the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in *Scioto Water* and the Colorado Supreme Court in *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo. 1995) (*en banc*). RWS #1's counsel should have brought the *Scioto Water* decision to this court's attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

At oral arguments, counsel for RWS #1 acknowledged that he should have cited the *Scioto Water* decision in RWS #1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in *Scioto Water*, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS #1's opening brief.

asserted that RWS #1's only claim is one brought pursuant to 42 U.S.C. § 1983, as 7 U.S.C. § 1926(b) authorizes no separate cause of action, and that any § 1983 claim is barred by the applicable statute of limitations, Iowa's two-year statute of limitations for personal injuries. Iowa Code § 614.1(2).

The same day the City filed its motion for summary judgment, RWS #1 filed its own separate motions for summary judgment on liability for violation of 7 U.S.C. § 1926(b) and for liability on its claim under 42 U.S.C. § 1983. The motion for summary judgment on liability on the claim brought pursuant to § 1983 clarifies somewhat the nature of that claim, at least as RWS #1 sees it: the summary judgment motion indicates that the § 1983 claim is that the City violated § 1926(b) under color of Iowa statutes that the City asserted justified its actions.

The City's motion, if granted, would appear to dispose of the case in its entirety, or at least that part of the case upon which federal jurisdiction is founded. However, RWS #1's motions, if granted, would establish only the City's liability, leaving the appropriate relief to be determined in further proceedings.

On April 8, 1997, the Iowa Rural Water Association filed a request to appear as *amicus curiae* by filing a brief and participating in the oral arguments on the pending dispositive motions. *Amicus curiae* seek to bolster the position of RWS #1, one of its members, that § 1926(b) is constitutional and would be violated by the City's actions. Over the City's objections, this court has permitted the participation of *amicus curiae* in both the briefing and arguments concerning § 1926(b), concluding that the

interests of justice will be served by permitting *amicus curiae* to file a brief and to participate at oral arguments.

The court heard oral arguments of the parties and *amicus curiae* on April 18, 1997. Plaintiff RWS #1 was represented at the oral arguments by lead counsel Louis T. Rosenberg of Louis T. Rosenberg, P.C., in San Antonio, Texas, who argued the case on behalf of plaintiff, and local counsel Randall G. Sease of the Sease Law Firm in Hartley, Iowa. Also present on behalf of RWS #1 was its Manager, Jean Still. Defendant City of Sioux Center, Iowa, was represented by counsel Ivan T. Webber, who argued the case on behalf of the City, and Paul Burns, both of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., in Des Moines, Iowa. Also present on behalf of the City were Harold Schiebout, City Manager, and Brian Van Engen, City Attorney. *Amicus curiae*, the Iowa Rural Water Association, was represented by counsel J.W. Dyer of Dyer & Associates Law Firm in McAllen, Texas. The arguments and briefing of counsel for the parties and *amicus* were of an unusually high caliber, and of great assistance to the court. Therefore, the court is convinced that, however complicated the issues involved and whatever the court's ultimate disposition may be, the parties and *amicus* were very ably represented.

Because the standards for summary judgment are pertinent to both the factual background of this litigation and the court's legal analysis, the court turns first to a statement of those summary judgment standards. The court will then present a recitation of the facts, both undisputed and disputed, that form the backdrop to the pending dispositive motions. Finally, the court will address as necessary the issues raised in the parties'

cross-motions for summary judgment, although not necessarily by taking each of those motions or issues in the order presented by the parties.

II. STANDARDS FOR SUMMARY JUDGMENT

The Eighth Circuit Court of Appeals recognizes "that summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990). On the other hand, the Federal Rules of Civil Procedure have authorized for nearly 60 years "motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Thus, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Wabun-Inini*, 900 F.2d at 1238 (quoting *Celotex*, 477 U.S. at 327); *Hartnagel v. Norman*, 953 F.2d 394, 396 (8th Cir. 1992).

The standard for granting summary judgment, in favor of either a claimant or a defendant, is well established. Rule 56 of the Federal Rules of Civil Procedure states in pertinent part:

> Rule 56. Summary Judgment
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service

> of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

Fed.R.Civ.P. 56(a)-(c) (emphasis added); *see also Celotex*, 477 U.S. at 322-23; *Reliance Ins. Co. v. Shenandoah S., Inc.*, 81 F.3d 789, 791 (8th Cir. 1996); *Beyerbach v. Sears*, 49 F.3d 1324, 1325 (8th Cir. 1995); *Munz v. Michael*, 28 F.3d 795, 798 (8th Cir. 1994); *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 708 (8th Cir. 1994); *Cole v. Bone*, 993 F.2d 1328, 1331 (8th Cir. 1993); *Woodsmith Publ'g Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990); *Wabun-Inini*, 900 F.2d at 1238 (citing *Fed. R. Civ. P.* 56(c)).[3] A court considering a motion for summary judgment must view all the

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[3] An issue of material fact is genuine if it has a real basis in the record. *Hartnagel*, 953 F.2d at 394 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Beyerbach*, 49 F.3d at 1326; *Hartnagel*, 953 F.2d at 394.

facts in the light most favorable to the nonmoving party, and give the non-movant the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996); *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1280 (8th Cir. 1996); *Marts v. Xerox, Inc.*, 77 F.3d 1109, 1112 (8th Cir. 1996); *Munz*, 28 F.3d at 796; *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994); *Johnson v. Group Health Plan, Inc.*, 994 F.2d 543, 545 (8th Cir. 1993); *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Coday v. City of Springfield*, 939 F.2d 666, 667 (8th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992).

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for their motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323); *see also Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). The moving party is not required by Rule 56 to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.*

"When a moving party has carried its burden under *Rule* 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The non-movant is required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P.* 56(e); *Celotex*, 477 U.S. at 324; *McLaughlin v.*

Esselte Pendaflex Corp., 50 F.3d 507, 511 (8th Cir. 1995); *Beyerbach*, 49 F.3d at 1325. Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.' " *Metge v. Baehler*, 762 F.2d 621, 625 (8th Cir. 1985) (quoting *Impro Prods., Inc. v. Herrick*, 715 F.2d 1267, 1272 (8th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984)), *cert. denied sub nom. Metge v. Bankers Trust Co.*, 474 U.S. 1057 (1986). The necessary proof that the nonmoving party must produce is not precisely measurable, but the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Allison*, 28 F.3d at 66.

In *Anderson*, 477 U.S. at 249, *Celotex*, 477 U.S. at 323-24, and *Matsushita*, 475 U.S. at 586-87, the Supreme Court established that a summary judgment motion should be interpreted by the trial court to accomplish its purpose of disposing of factually unsupported claims, and the trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Quick*, 90 F.3d at 1376-77; *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). The trial court, therefore, must "assess the adequacy of the nonmovants' response and whether that showing, on admissible evidence, would be sufficient to carry the burden of proof at trial." *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322). If the non-movant fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party is "entitled to judgment as a

matter of law." *Celotex*, 477 U.S. at 323; *Woodsmith*, 904 F.2d at 1247. However, if the court can conclude that a reasonable trier of fact could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*, 477 U.S. at 248; *Burk*, 948 F.2d at 492; *Woodsmith*, 904 F.2d at 1247. With these standards in mind, the court turns to consideration of the factual background to the parties' cross-motions for summary judgment.

III. FACTUAL BACKGROUND

A. Undisputed Facts

Looking to the parties' statements of facts in support of and resistance to the various motions for summary judgment, the court finds that the following facts are not in dispute. Plaintiff RWS #1 is a non-profit water corporation created pursuant to Iowa Code Ch. 504A by the filing of articles of incorporation with the Iowa Secretary of State on May 6, 1969.[4] RWS #1 operates as a retail water service corporation, which began providing or making water services available in 1972. The general area in which RWS #1 has provided service is an area approximately eighteen miles by thirty-six miles including thirteen townships in Sioux County, Iowa, and six townships in O'Brien County, Iowa.

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[4] RWS #1 contends that it is a membership-based association and has never converted from a non-profit corporation to a "special water district" within the meaning of Iowa Code § 357A.20. The significance or insignificance of a conversion to a "special water district" under Iowa law will be considered *infra*.

The City is a municipality located in Sioux County, Iowa. It is surrounded by RWS #1's service area. However, the City also operates a water supply system and supplies water to customers inside its city limits. Until recently, the parties had an "interconnect" agreement whereby each was to supply emergency water to the other. The City has also from time to time contracted with RWS #1 for water treatment and supply services and the parties have been involved in other joint uses of facilities.

RWS #1's building projects were for many years financed by loans from the Farm Home Administration (FmHA) and RWS #1 is once again indebted to the United States. For example, RWS #1 obtained loans from the FmHA from 1972 to 1975. However, in 1988, RWS #1 paid off its existing loans from the FmHA. The FmHA released its existing mortgages and liens on September 22, 1988, and marked the loans "paid in full." RWS #1 borrowed the money to pay off its federal loans in 1988 from Norwest Bank in Minneapolis, Minnesota. Norwest Bank took no security for its loan. RWS #1 did not become indebted to the United States again until July 1, 1992, when RWS #1 again took out a loan from the FmHA. RWS #1's indebtedness to the United States for 1992 and 1995 totals $2,030,000 and is secured by mortgages and liens to the United States. Thus, RWS #1 is currently indebted to the United States, but did not have any indebtedness to the United States from September 22, 1988, until July 1, 1992.

In 1989, the City annexed an area of 1,620 acres outside of its 1975 city limits. This annexed area included territory in which RWS #1 had previously supplied water

or had laid pipes and built other facilities. The annexation was completed on December 22, 1989. Another twenty acres, the "Byl subdivision," were annexed in either 1995 or 1996.[5]

RWS #1 has never applied to the City, pursuant to Iowa Code § 357A.2, to serve water customers in the disputed area, but RWS #1 disputes here, as a matter of law, whether it was ever required to do so. RWS #1 does not have a franchise or any easements from the City to provide water services to customers in the disputed territory. Furthermore, RWS #1 has at times advised the City of requests for connection to the rural water system from customers within two miles of the City's 1989 city limits and has asked the City to advise RWS #1 whether the City or RWS #1 should supply the customer. RWS #1 continues to supply water to some customers now inside the City's 1989 city limits. Since the 1989 annexation, the City has laid some new water service lines that parallel existing water lines of RWS #1.

B. Disputed Facts

The City disputes that RWS #1 has ever secured an exclusive "service area" pursuant to Iowa law. Furthermore, the City disputes the existence of what RWS #1 refers to as its "federal franchise" for exclusive service to customers in the disputed area, contending that not only

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[5] RWS #1 states that this annexation occurred in 1996, but the City contends that it took place in 1995. It is unclear from the record whether this is an actual factual dispute or simply a question of a typographical error on RWS #1's part.

was the federal government without power to make such a franchise, a legal question, but that there is no evidence in the record of any such franchise, a factual matter. The City also disputes RWS #1's contention that the City had no customers outside its 1975 city limits or ever made services available outside of its city limits. Similarly, the City disputes whether RWS #1 had pipes in the ground in 1975 and 1976 that would have allowed RWS #1 to provide or make service available within one-and-one-half miles or less of the City's 1975 city limits. The City also disputes the extent to which RWS #1 was providing or making available water services in the disputed area or the area in which RWS #1 claims it was providing or making available such services. Furthermore, the City disputes the number of RWS #1's customers who were inside the area annexed by the City in 1989 and contends that RWS #1 has "sold" customers to the City since the annexation.

To summarize remaining disputes more generally, the City also disputes the identity of various customers connected to City water lines since annexation and whether these customers were connected to RWS #1 for their water supply prior to the annexation; the location and purpose of overlapping or parallel water lines of the City and RWS #1 in the disputed area; and the extent to which any services the City has provided duplicated services available from RWS #1.

RWS #1 disputes that it ever converted to, or was ever required to convert from a non-profit corporation to, a "special water district" within the meaning of Iowa § 357A.20, which is a factual matter. Consequently, it also disputes whether it was ever required to apply to the

City, pursuant to Iowa Code § 357A.2, to serve water customers in the disputed area, which is either a question of law or a mixed question of law and fact. Finally, the parties dispute whether RWS #1's pay-off of its federal loans in 1988 was pursuant to the Omnibus Budget Reconciliation Act (OBRA) of 1986 and the Agricultural Credit Act of 1987(ACA), which amended the 1986 OBRA by providing for a "Buy Out Program" of FmHA loans.

IV. LEGAL ANALYSIS

In their oral arguments, the parties and *amicus* focused on the scope of the protection provided by 7 U.S.C. § 1926(b), continuation of protection of the statute during the FmHA "Buy Out Program," as provided in 7 U.S.C. § 1929a *note*, subsections (f) and (g), and the interplay between § 1926(b) and certain Iowa statutes upon which the City principally relies. Nonetheless, before the court can consider the merits of the parties' arguments for summary judgment on RWS #1's claim or claims, the for summary judgment on RWS #1's claim or claims, the court finds that it must first determine what, exactly, is the nature of RWS #1's claim or claims and how RWS #1's claim or claims can be brought before the court. The court must then determine whether RWS #1's action is time-barred, as the City contends. Only if RWS #1's action is properly before the court will it be necessary for the court to consider any other arguments of the parties.

A. The Nature Of RWS #1's Claims

In its combined resistance to RWS #1's separate motions for summary judgment on liability under

§ 1926(b) and § 1983, the City contends that RWS #1 is mistaken in its assertion that it has two separate claims, one for violation of § 1926(b) itself and another under § 1983 to vindicate rights under § 1926(b). The City contends that such a mistaken notion should have been corrected by reading the decision of the Sixth Circuit Court of Appeals in *Wayne v. Sebring*, 36 F.3d 517 (6th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2000 (1995), which RWS #1 itself cites for the proposition that § 1926(b) includes no enforcement provisions. Thus, the City contends, RWS #1 has but one cause of action, an action pursuant to § 1983 for alleged violation of rights under § 1926(b).[6]

RWS #1 responds that courts have enforced the provisions of § 1926(b) and that the legislative history of that provision suggests an intent to create enforceable obligations or prohibitions. This argument, of course, merely begs the question of *how* the prohibitions of § 1926(b) are to be enforced, because the statute plainly does not contain express language authorizing a private cause of action to enforce its terms. However, RWS #1 also contends that, not only can it enforce its rights by bringing a cause of action for a "violation" of § 1983, which is in turn predicated on a violation of § 1926(b), but it can also bring an action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, which provides an independent vehicle to obtain not only a declaration of rights under § 1926(b), but further relief for a violation of the statute.

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[6] The City contends further that such a cause of action is time-barred, which is a matter the court addresses later in Section IV.B.1. of this opinion.

1. A cause of action for a "violation" of § 1983

In its motion for summary judgment on liability under § 1983, RWS #1 asserts that it has proved a "violation" of § 1983, because it has proved a "predicate" violation of § 1926(b). Rural Water System No. 1's Memorandum In Support Of Motion For 42 U.S.C. Sec.1983 Summary Judgment On Liability Pursuant To Fed.R.Civ.P. 56(a) (hereinafter "RWS #1's Brief On § 1983 Liability"), pp. 2-3. However, as this court has explained on more than one occasion, one does not "violate" § 1983. *See Laird v. Ramirez*, 884 F. Supp. 1265, 1282 n.11 (N.D. Iowa 1995); *DePugh v. Smith*, 880 F. Supp. 651, 661 (N.D. Iowa 1995); *Mummelthie v. City of Mason City, Iowa*, 873 F. Supp. 1293, 1315 n.10 (N.D. Iowa 1995), *aff'd*, 78 F.3d 589 (8th Cir. 1996) (table opinion).

In its prior decisions, this court noted the following:

Title 42 U.S.C. § 1983 provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Section 1983 was designed to provide a "broad remedy for violations of federally protected civil rights." *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 685 (1978). *However, § 1983*

> *provides no substantive rights. Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). *"[O]ne cannot go into court and claim a 'violation of section 1983' – for section 1983 by itself does not protect anyone against anything." Id. Rather, § 1983 provides a remedy for violations of all "rights, privileges, or immunities secured by the Constitution and laws [of the United States]."* 42 U.S.C. § 1983 (emphasis added); *Maine v. Thiboutot*, 448 U.S. 1, 3 (1980) ("Constitution and laws" means that § 1983 provides remedies for violations of rights created by federal statute, as well as those created by the Constitution).

Laird, 884 F. Supp. at 1282 n.11 (emphasis added); *DePugh*, 880 F. Supp. at 661; *Mummelthie*, 873 F. Supp. at 1315 n.10. Therefore, RWS #1 has no claim for a "violation" of § 1983.

Although RWS #1 is incorrect to assert a "violation" of § 1983, § 1983 may nonetheless provide a vehicle whereby RWS #1 may bring before this court its claim of a violation of § 1926(b), a law of the United States. *See Blessing v. Freestone*, ___ U.S. ___, ___, 117 S.Ct. 1353, 1359 (1997) ("Section 1983 imposes liability on anyone who, under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws.' We have held that this provision safeguards certain rights conferred by federal statutes," citing *Thiboutot, infra*); *Maine v. Thiboutot*, 448 U.S. 1, 3 (1980) (the language "Constitution *and laws*" in § 1983 means that § 1983 provides remedies for violations of rights created by a federal statute, as well as those created by the Constitution). However, resort to a cause of action pursuant to

§ 1983 to address a violation of a federal statute is *not* available "where the 'governing statute provides an exclusive remedy for violations of its terms.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981); *accord Blessing*, ___ U.S. at ___, 117 S.Ct. at 1360 ("Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress 'specifically foreclosed a remedy under § 1983. . . . ' Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983"; citations omitted); *Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987) (citing *Pennhurst*). Several courts have concluded that § 1926(b) provides no such exclusive remedy for violations of its terms.

Most recently, the Fifth Circuit Court of Appeals has noted that "[s]ection 1926(b) does not create or specify a remedy for the enforcement of violations." *North Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 917 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 586 (1996). In a more thorough analysis of the issue, the Sixth Circuit Court of Appeals considered whether § 1926(b) itself created a private right of action, or whether a private right of action was available for a violation of § 1926(b) via § 1983. *See Wayne v. Village of Sebring*, 36 F.3d 517, 528-29 (6th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2000 (1995).[7] The court noted that § 1983 permits

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[7] RWS #1 misconstrues the question and conclusion in the

suits for violation of federal statutes *unless* "(1) 'the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.' " *Id.* (quoting *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990), in turn quoting *Wright v.*

Wayne decision. RWS #1 states that "the issue [in *Wayne*] was actually whether the Code of Federal Regulations ("C.F.R.") could create a private right of action (which the court found to be the case)." Rural Water System No. 1's Reply To Defendant City of Sioux Center's Combined Resistance To Plaintiff's Motions For Summary Judgment Under 7 U.S.C. Sec.1926(b) and 42 U.S.C. Sec.1983 (hereinafter "Plaintiff's Reply Brief"), p. 3. RWS #1's formulation of the question in *Wayne* suggests that the question there was not whether § 1926(b) created a right enforceable via a private cause of action. Contrary to RWS #1's characterization of the issues and conclusions of the court in *Wayne*, however, the Sixth Circuit Court of Appeals was actually presented with the question of whether a federal regulation could create a cause of action, and the court actually held that it was *not* the federal regulation, but an ordinance enacted to fulfill the requirements of the regulation, that created a private cause of action. *Wayne*, 36 F.3d at 528. Specifically, the federal regulation in question required applicants for FmHA funding to agree that a person within the service area who can feasibly and legally receive water service has a private right of action against the recipient of the FmHA funding if the recipient fails to make adequate service available. *Id.* The court held that the private right of action was *not* created by the regulation, but by the municipal body itself, when the municipal body passed an ordinance creating the cause of action to fulfill the requirements of the federal regulation. *Id.*

More to the point, however, as is discussed in the body of this ruling, the court in *Wayne* did find that, in the alternative, § 1983 provided a private cause of action to enforce rights created by § 1926(b). *Id.* at 528.

Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423 (1987)).

The court found that neither of these two exceptions applied. First, the court found that § 1926(b) created a right that was "judicially enforceable." *Id.* at 529. Next, the court found that the second exception required " 'a comprehensive enforcement mechanism for protection of a federal right' " that was not satisfied by "[m]ere availability of administrative protections." *Id.* (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)). The court found that Congress had provided "no enforcement mechanism for protecting the right that § 1926(b) creates." *Id.* Therefore, the court found that "*pursuant to* § 1983, § 1926(b) gives rise to a private right of action on the part of rural water service users." *Id.*

This court has employed the same analysis of whether § 1983 provides a cause of action for enforcement of federal statutory rights in other contexts. *Laird*, 884 F. Supp. at 1276-78 (considering whether an action pursuant to § 1983 to enforce rights under the Social Security Act (SSA) was precluded by enforcement mechanisms under the SSA); *Mummelthie*, 873 F. Supp. at 1314 (determining whether the ADEA provided the exclusive remedy for age discrimination or whether a cause of action pursuant to § 1983 was also available). Furthermore, this court finds that the reasoning by which the Sixth Circuit Court of Appeals in *Wayne* concluded that § 1983 provided the enforcement mechanism for § 1926(b) "on the part of rural water service users," *Wayne*, 36 F.3d at 529, applies with equal force to the question of whether associations indebted to the FmHA may enforce rights

under § 1926(b) against allegedly encroaching municipalities.

This court therefore holds, first, that § 1926(b) creates an enforceable right, but provides no mechanism for its enforcement. Thus, RWS #1 has no cause of action created by § 1926(b) for violation of its terms. Second, this court holds that one means to enforce the rights created by § 1926(b) is a cause of action *pursuant to*, but not for "violation" of, § 1983.

2. *Other ways to enforce § 1926(b)*

However, the court also concludes that § 1983 does not necessarily provide the *exclusive* vehicle for enforcing rights under § 1926(b), as the City seems to suggest. Thus, there may be other causes of action for a "violation" of § 1926(b) that justify RWS #1's assertion of a second cause of action, besides its claim pursuant to § 1983, and may further justify RWS #1's separate motion for summary judgment on liability for violation of § 1926(b).

For example, the Fifth Circuit Court of Appeals noted in *North Alamo Water Supply Corp.*, a decision cited above, that "an injunction has been the principal tool employed by the courts with which to enforce the statute and prevent violations." *North Alamo Water Supply Corp.*, 90 F.3d at 917 (citing *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987), and *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311, 315 (7th Cir. 1989)). Therefore, where other requirements for injunctive relief were met, such as ample evidence in the record to support an injunction and sufficient specificity of the injunction, the court in the *North Alamo Water*

Supply Corp. case upheld injunctive relief as a means to "enforce" § 1926(b). *Id.* at 917. In addition to the decisions cited by the Fifth Circuit Court of Appeals in *North Alamo Water Supply Corp.*, and that decision itself, injunctive relief has been sought or granted in other cases. *See, e.g., Scioto Water,* 103 F.3d at 41 (denying injunctive relief sought for an alleged violation of § 1926(b), not because such relief was unavailable to enforce the statute, but because the plaintiff was not entitled to the protections of § 1926(b)); *Wayne,* 36 F.3d at 531 (injunctive relief granted for a violation of § 1926(b)).

The willingness of courts to grant injunctive relief for violations of § 1926(b), however, does not necessarily answer the question of what authority creates a private cause of action to seek such relief. Certainly, § 1983 would provide the vehicle to obtain such relief. 42 U.S.C. § 1983 (authorizing a private right of action "at law, suit in equity, or other proper proceeding for redress" for persons injured by a violation of the Constitution or laws of the United States). Thus, a claim for injunctive relief from violations of § 1926(b) would seem to fall within the ambit of a § 1983 claim.

As RWS #1 suggests, in addition to actions for injunctive relief, courts have entertained declaratory judgment actions to determine whether violations of § 1926(b) have or could occur. *See, e.g., Scioto Water,* 103 F.3d at 41 (declaratory judgment action alleging a violation of § 1926(b) and seeking injunctive relief); *Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky.*, 93 F.3d 230, 232 (6th Cir. 1996) (declaratory judgment action by water district seeking protection from encroachment on its service area by a municipality in violation of § 1926(b)); *see*

also CSL Utilities, Inc. v. Jennings Water, Inc., 16 F.3d 130 (7th Cir. 1994) (declaratory judgment action by a private, non-profit water utility against a rural water association indebted to FmHA seeking a declaration that the utility's building of water facility did not violate § 1926(b)), *cert. denied*, 513 U.S. 812 (1994). Congress has provided for declaratory judgments by the federal courts through two provisions of the Declaratory Judgment Act, which state, in pertinent part, the following:

> **§ 2201. Creation of remedy**
>
> **(a)** In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> * * *
>
> **§ 2202. Further relief**
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. §§ 2201(a), 2202. These two provisions establish the means whereby RWS #1 can obtain not only the declaratory relief it seeks, 28 U.S.C. § 2201, but also such "further" relief as is "necessary and appropriate." 28 U.S.C. § 2202. The vehicle of enforcing § 1926(b) afforded

by the Declaratory Judgment Act is therefore an alternative to that provided by § 1983.[8]

Because § 1983 is not the only vehicle for enforcement of § 1926(b), RWS #1 has properly asserted two different claims founded on alleged violations of § 1926(b).

B. The Timeliness Of RWS #1's Claims

1. The timeliness of the § 1983 action

The City contends that RWS #1's § 1983 claim is time-barred by the applicable statute of limitations for such actions, Iowa's two-year statute of limitations for personal injuries, Iowa Code § 614.1(2). The City contends that RWS #1 is complaining of actions taken more than two years before suit was filed November 2, 1995. Specifically, RWS #1 complains of actions taken by the City as early as 1987, with the heart of their complaint being that the City improperly annexed disputed territory in 1989.

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[8] These two vehicles, a cause of action under § 1983 and a declaratory judgment action, may be substantially overlapping, and a § 1983 action might provide all of the relief also available from a declaratory judgment action, but the two vehicles of enforcement are not mutually exclusive.

Furthermore, the federal Declaratory Judgment Act "is a procedural statute, not a jurisdictional statute." *Missouri ex rel. Missouri Highway Transp. Comm'n v. Cuffley*, ___ F.3d ___, ___, 1997 WL 225447, *2 (8th Cir. May 7, 1997). Therefore, there must be some basis for federal jurisdiction other than the Declaratory Judgment Act. *Id.* The basis for federal jurisdiction over the Declaratory Judgment Act claim here is federal question jurisdiction, 28 U.S.C. § 1331, based on an alleged violation or threatened violation of 7 U.S.C. § 1926(b).

However, the complaint in this matter was not filed until nearly six years later and a § 1983 claim was not specifically asserted until September 30, 1996, almost seven years later. Thus, the City contends the original complaint and amended complaint asserting a § 1983 claim were filed well after the limitations period had run. RWS #1 responds that it has asserted a "continuing violation" of § 1926(b), because of the City's pattern and practice of continuing to assert its right to serve water customers in the disputed area, beginning in 1987 and continuing to the present.

a. The applicable statute of limitations

Section 1983 contains no statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985). When such a void in federal statutory law occurs, federal courts have repeatedly "borrowed" the state laws governing an analogous cause of action. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Kansas Pub. Emp. Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608, 611 (8th Cir. 1995) (in a federal question case, where there is no federal statute of limitations, the federal court will borrow the forum state's limitations laws, if not inconsistent with federal law or policy), *cert. denied*, ___ U.S. ___, 116 S.Ct. 915 (1996). For § 1983 claims, courts have "borrowed" the personal injury statute of limitations of the state in which the court sits, identifying that statute in Iowa cases to be Iowa Code § 614.1(2). *Owens v. Okure*, 488 U.S. 235, 236 (1989); *Wilson v. Garcia*, 471 U.S. at 280; *Schanou v. Lancaster County Sch. Dist. No. 160*, 62 F.3d 1040, 1043 (8th Cir. 1995) (parties

and court agreed that Nebraska's four-year statute of limitations for personal injuries applied to action pursuant to § 1983); *Sanchez v. United States*, 49 F.3d 1329, 1330 (8th Cir. 1995) (holding that both *Bivens* claims and § 1983 claims are governed by the statute of limitations for personal injuries of the forum state, and noting that the applicable statute, Iowa's personal injury statute of limitations, Iowa Code § 614.1(2), provides for a limitations period of two years); *Penn v. Iowa State Bd. of Regents*, 999 F.2d 305, 307 (8th Cir. 1993) (applying Iowa's two-year personal injury statute, citing *Wilson*); *Davis v. Ross*, 995 F.2d 137, 138 (8th Cir. 1993) (*per curiam*) (applying Iowa's two-year personal injury statute of limitations, citing *Wycoff v. Menke*, 773 F.2d 983, 984 (8th Cir. 1985), *cert. denied*, 475 U.S. 1028 (1986)); *Kaster v. State of Iowa*, 975 F.2d 1381, 1382 (8th Cir. 1992) (Iowa's two-year personal injury statute of limitations applies to a § 1983 action); *Carr v. Aubuchon*, 969 F.2d 714, 716 (8th Cir. 1992) (applying Missouri's five-year personal injury statute); *Lown v. Brimeyer*, 956 F.2d 780, 781 (8th Cir.) (Iowa's two-year personal injury statute applies to § 1983 claims, citing *Wycoff*), *cert. denied*, 506 U.S. 860 (1992); *Bridgeman v. Nebraska State Penitentiary*, 849 F.2d 1076, 1077 (8th Cir. 1988) (applying Nebraska's four-year personal injury statute to § 1983 claim, thus applying *Wilson* retroactively); *Chandler v. Presiding Judge, Callaway County*, 838 F.2d 977, 978-79 (8th Cir. 1988) (applying Missouri's five-year personal injury statute of limitations); *Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532, 533 (8th Cir.) (applying South Dakota's three-year personal injury statute to § 1983 claim), *appeal dismissed and cert. denied*, 484 U.S. 802 (1987); *Wycoff*, 773 F.2d at 984.

Therefore, in this case, RWS #1's claim pursuant to § 1983 is governed by the personal injury statute of the state of Iowa. The applicable statute of limitations is Iowa Code § 614.1(2). That statute provides, in pertinent part:

> **614.1 Period.**
>
> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> * * *
>
> 2. *Injuries to person or reputation – relative rights – statute penalty.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

Iowa Code § 614.1(2). Certainly, much of the conduct by the City of which RWS #1 complains occurred more than two years before the original complaint in this matter was filed. The question is, when did RWS #1's § 1983 cause of action *accrue*?

b. "Accrual" and "continuing violations"

A "continuing violation" is an exception to the bar posed by a statute of limitations to claims based on actions that occurred before the statute of limitations period. *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996) (stating this principle in a Title VII "hostile environment" case), *cert. denied*, ___ U.S. ___, 117 S.Ct. 946 (1997); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167 (8th Cir. 1995) (*en banc*) (Title VII case).

Although the "continuing violation" theory is most often encountered in discrimination cases, it is also applicable to § 1983 claims for continuing violations of a federal law or the Constitution. *See, e.g., Kuhnle Bros., Inc. v. County of Geauga,* 103 F.3d 516, 520 (6th Cir. 1997). When a "continuing violation" is shown, the limitations period runs from the "last occurrence" of wrongful conduct. *Varner,* 94 F.3d at 1214; *Gipson v. KAS Snacktime Co.,* 83 F.3d 225, 229 (8th Cir. 1996). Furthermore, the entire course of conduct creating the continuing violation is actionable. *Varner,* 94 F.3d at 1214.

RWS #1 has alleged a series or pattern of wrongful actions by the City, encroachments upon RWS #1's service area, all stemming from the expansion of the City to its current city limits in 1989. Actions that are alleged to be part of this series or pattern of wrongful acts have continued to occur until well within the limitations period, including attempts by the City to serve customers within the disputed territory in 1994, 1995, and, in the case of the "Byl subdivision," 1996. RWS #1 has supported its allegations of a "continuing violation" with documentary evidence sufficient, at a minimum, to establish a genuine issue of material fact as to whether there have in fact been continuing episodes that form a series or pattern of violations of § 1926(b).

Therefore, there is, at a minimum, a genuine issue of material fact concerning whether RWS #1's claims asserted pursuant to § 1983 are time-barred. The City is not entitled to summary judgment on this ground, and the court may properly consider the cross-motions for summary judgment on the merits of the § 1983 claim.

2. *The timeliness of a declaratory judgment action*

The question of the timeliness of RWS #1's declaratory judgment action is not one of being too late, but potentially too early. This is so, because "[t]he case or controversy requirement of Article III applies with equal force to actions for declaratory judgment as it does to actions seeking traditional . . . relief." *Marine Equip. Management Co. v. United States*, 4 F.3d 643, 646 (8th Cir. 1993) (citing *Foster v. Center Township of La Porte County*, 798 F.2d 237, 242 (7th Cir. 1986)); *see also Missouri ex rel. Missouri Highway & Transp. Comm'n v. Cuffley*, ___ F.3d ___, ___, 1997 WL 225447, *4 (8th Cir. May 7, 1997) ("The case-or-controversy requirement of Article III applies in declaratory actions, just as it does in coercive actions."). The test recognized by the Eighth Circuit Court of Appeals as applicable to the question of whether there is an actual "case or controversy" for an action under the Declaratory Judgment Act is "whether 'there is a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Id.* (quoting *Caldwell v. Gurley Refining Co.*, 755 F.2d 645 (8th Cir. 1985), in turn citing *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941)); *see also Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972) (same test); *Cuffley*, ___ F.3d at ___, 1997 WL 225447 at *4 (" 'The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract," " 'quoting *Babbitt v. United Farm Workers, Nat'l Union*, 442 U.S. 289, 298 (1979), in turn

quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). Because "substantial controversy" is "imprecise," the Eighth Circuit Court of Appeals has clarified that the decision of whether such a controversy exists is to be made upon the facts on a case-by-case basis. *Id.* (citing *Golden v. Zwickler*, 394 U.S. 103, 108 (1969)). Furthermore, in order to be "substantial," the controversy "must be live throughout the course of the litigation and must exist at the time of the district court's hearing of the matter and not simply when the case is filed." *Id.*

Here, the court finds that the three requirements for prosecution of the present declaratory judgment action have been met. First, there is indeed a "live" or "substantial controversy" over whether the actions of the City have violated or may in the future violate § 1926(b). *Id.* Second, that controversy is between parties having adverse legal interests who are properly aligned and present before the court to argue the controversy. *Id.* Third, the controversy remains of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Id.* There have been, and for the foreseeable future are likely to be, disputes over which customers "belong" to which entity desiring to provide water services. Thus, the declaratory judgment action is timely.

Furthermore, the court finds this case to be one in which it should exercise its discretion to hear declaratory judgment claims. The Declaratory Judgment Act confers " 'unique and substantial discretion' " upon federal courts, including discretion whether to entertain, stay, or dismiss the action. *Horne v. Firemen's Retirement Sys. of St. Louis*, 69 F.3d 233, 236 (8th Cir. 1995) (quoting *Wilton v. Seven Falls Co.*, ___ U.S. ___, ___, 115 S. Ct. 2137, 2139 &

2144 (1995)); *International Ass'n of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 774 (1996); *BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir. 1995); *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1374 (8th Cir. 1994) (noting that "[a] district court is not obligated to exercise jurisdiction in a diversity case brought under the Declaratory Judgment Act, citing *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942), and discussing grounds for abstaining from considering such an action).[9] For example,

> the Declaratory Judgment Act is not to be used either for tactical advantage by litigants or to open a new portal of entry to federal court for suits that are essentially defensive or reactive to state actions. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18 n.20, 103 S. Ct. 927, 937, 74 L. Ed. 2d 765 (1983); *BASF [Corp. v. Symington]*, 50 F.3d [555,] 558 [(8th Cir. 1995)] (citing cases); *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1372-73 (9th Cir. 1991); *Omaha Property [and Cas. Ins. Co. v. Johnson]*, 923 F.2d [446,] 448 [(6th Cir. 1991)]; *Continental Airlines [v. Goodyear Tire & Rubber Co.]*, 819 F.2d

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[9] No party has suggested that this court should abstain from hearing this action, so the court will not discuss here the various grounds for abstention from a declaratory judgment action. Suffice it to say that, although the court's decision to exercise jurisdiction is discretionary, that "does not mean that the decision to abstain can be made 'as a matter of whim or personal disinclination.' " *United States Fidelity and Guaranty Co. v. Murphy Oil USA, Inc.*, 21 F.3d 259, 261 (8th Cir. 1994) (quoting *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (*per curiam*)).

> [1519,] 1524 [(9th Cir. 1987)]; *Transamerica [Occidental Life Ins. Co. v. DiGregorio]*, 811 F.2d [1249,] 1253 [(9th Cir. 1987)]; *Home Fed. Sav. and Loan Assn. v. Ins. Dept. of Iowa*, 571 F.2d 423, 427 (8th Cir. 1978). . . .
>
> More specifically, the Declaratory Judgment Act is not to be used to bring to the federal courts an affirmative defense which can be asserted in a pending state action. *Franchise Tax Bd. [of Calif. v. Constr. Laborers Vacation Trust for S. Calif.]*, 463 U.S. [1,] 16, 103 S. Ct. at 2849-50 [(1983)] (discussing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950)); *BASF*, 50 F.3d at 558. In addition, the Declaratory Judgment Act is not meant to expand federal jurisdiction. *Franchise Tax Bd.*, 463 U.S. at 15-16, 103 S. Ct. at 2849-50; *Home Federal*, 571 F.2d at 427 n.17.

Angoff, 58 F.3d at 1270. The court finds none of these misuses of the Declaratory Judgment Act here. Instead, the court finds a legitimate action, arising from a controversy over the proper interpretation of federal law, and the parties ask the court to provide the relief afforded by the Declaratory Judgment Act, that is, "to declare the rights and other legal relations of any interested party." 28 U.S.C. § 2201(a).

Therefore, the declaratory judgment claim, like the § 1983 claim, is properly before the court. With these preliminary questions resolved, the court may consider the portions of the cross-motions for summary judgment concerning the merits of RWS #1's claims.

C. The Merits Of The Claims

The questions upon which the parties and amicus focused their attentions are the following: Is RWS #1 entitled to the protections of § 1926(b) and does the City's conduct violate or potentially violate the protections afforded to RWS #1 by the statute? These two questions, at the heart of this litigation, are contentious indeed. Not only have these questions been argued tooth and nail by the parties, but they have drawn *amicus curiae*, who also see much at stake in how these questions are resolved, into the concrete controversy between the parties. Although the answer to the first question involves primarily interpretation of federal statutes, the answer to the second question involves a rather complicated interplay between federal law and state law, with the companion question of whether the state law is preempted by the federal. Furthermore, if the first and second questions are answered favorably to RWS #1, the City contends that it is nonetheless entitled to judgment in its favor, because the scope of the § 1926(b) protection asserted by RWS #1 is a violation of the Tenth Amendment, thus rendering § 1926(b) unconstitutional. This Gordian knot can be untangled only one strand at a time;[10] therefore, the court addresses first the question of whether RWS #1 is entitled to whatever protections § 1926(b) might afford under the circumstances.

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[10] Alexander the Great's simpler solution, slicing through the knot with a sword, *see, e.g., Funk and Wagnalls Standard Dictionary of Folklore, Mythology, and Legend* 460 (Maria Leach, ed., Funk & Wagnalls, 1972); *Bulfinch's Mythology* 44 (Richard P. Martin, ed., 1991), is not available to the court.

1. Is RWS #1 entitled to the protections of § 1926(b)?

a. The applicable statutes

Section 1926 of Title 7, enacted as part of the Consolidated Farm and Rural Development Act (CFRDA), governs federal loans made to water and waste facilities. 7 U.S.C. § 1926(b); *Scioto Water,* 103 F.3d at 40. It authorizes the Secretary of Agriculture to make or insure loans to associations, for example, for water conservation, use, development, and control projects. *Id.*; *Scioto Water,* 103 F.3d at 40.

Subdivision (a) of § 1926 governs the terms of loans made or insured by the Secretary of Agriculture. 7 U.S.C. § 1926(a). The specific subdivision of § 1926 in question here, however, is subsection (b), which provides as follows:

> **(b) Curtailment or limitation of service prohibited**
>
> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area *during the term of such loan*; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b) (emphasis added). Courts have identified two purposes behind § 1926(b): "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and [Farmers Home Administration's] loans) by protecting them from the expansion of nearby cities and towns." *City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1060 (5th Cir. 1987) (citing S.REP. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2243, 2309); *accord Scioto Water*, 103 F.3d at 40 (quoting *Bear Creek*); *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 233 ("In order to encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and Farmers Home Administration loans, 7 U.S.C. § 1926(b) was enacted," citing *Bear Creek*); *North Alamo Water Supply Corp.*, 90 F.3d at 915 (also citing that Circuit Court of Appeals' prior decision in *Bear Creek* for the purposes of the statute); *CSL Utils., Inc.*, 16 F.3d at 137 ("Section § 1926(b) is, of course, aimed at suppressing competition with a supplier endowed with public funds."). Thus, § 1926(b) protects a borrowing association, and consequently the United States government as a secured party on loans to the association, from curtailment of the association's service area, which is the association's financial base.

In order to fulfill these purposes, the provision " 'should be given a liberal interpretation that protects rural water associations indebted to the FmHA from municipal encroachment.' " *Lexington-South Elkhorn Water*

Dist., 93 F.3d at 235 (quoting *Wayne*, 36 F.3d at 527, in turn quoting *Jennings Water, Inc.*, 895 F.2d at 315); *North Alamo Water Supply Corp.*, 90 F.3d at 915 ("Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment."); *Jennings Water*, 895 F.2d at 315 ("All five federal courts that have reviewed section 1926(b) have concluded that the provision should be given a liberal interpretation that protects rural water associations indebted to the FmHA from municipal encroachment.").

Courts have also consistently noted the requirement of § 1926(b) that an association be indebted to the United States in order to obtain the protections of that subdivision. *Scioto Water*, 103 F.3d at 42; *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235 (describing indebtedness to the FmHA as one of the "threshold requirements" for protection under § 1926(b), along with "having 'made service available' in the area"); *CSL Utils., Inc.*, 16 F.3d at 133 (recognizing that the protection of § 1926(b) exists only "during the term of such loan."). RWS #1 does not dispute that it was not indebted to the United States between September 22, 1988, and July 1, 1992. The City contends that RWS #1 lost the protections of § 1926(b) during the period it was not indebted to the FmHA. However, RWS #1 contends that it was still entitled to the protection of § 1926(b) during that period by virtue of statutes governing the sell-off by the FmHA of the obligations of water associations held by FmHA. RWS #1 contends further that its protection under § 1926(b) was renewed when it again became indebted to the United States in 1992.

As part of the Omnibus Budget Reconciliation Act of 1986 (1986 OBRA), the FmHA was required to sell-off some of the bonds and notes it had acquired under § 1926(a). Pub. L. 99-509, § 1001; *see also Scioto Water,* 103 F.3d at 40; *Wayne,* 36 F.3d at 526-27. The provisions of the sell-off were codified in what is now identified as 7 U.S.C. § 1929a *note,* entitled "Sale of Rural Development Notes and Other Obligations." A year later, in the Agricultural Credit Act of 1987 (1987 ACA), Congress modified the terms of the sell-off program established in the 1986 OBRA by requiring the FmHA to offer to the issuer of bonds or notes subject to sale the right to buy them back before the FmHA sold them to a third party. *Scioto Water,* 103 F.3d at 40 (citing Pub. L. 99-509, § 1001, 100 Stat. 1874, as amended by Pub. L. 100-233, § 803, 101 Stat. 1714 (1988), 7 U.S.C. § 1929a *note,* subsection (f)). This requirement is found in a provision referred to by courts as "subsection (f)," because it was codified at 7 U.S.C. § 1929a *note,* subsection (f), and also sometimes as the "right of first refusal" provision. *Scioto Water,* 103 F.3d at 40-41. Subsection (f) provides as follows:

> (f)(1) In general. – Before conducting a sale of a portfolio of notes or other obligations under this section [Pub. L. 99-509, § 1001, amending this section and enacting provisions set out as notes under this section], the Secretary of Agriculture shall –
>
> (A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and
>
> (B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a

> price to be determined under paragraph (2) [entitled "Determination of offering price"].

7 U.S.C. § 1929a *note*, subsection (f). Paragraph (2) of subsection (f) provides for the sale of bonds to the issuer at a discount. 7 U.S.C. § 1929a *note*, subsection (f)(2).

A further modification of the sell-off program instituted by the 1987 ACA was the enactment of so-called "subsection (g)," codified at 7 U.S.C. § 1929a *note*, subsection (g). Subsection (g) provides as follows:

> Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. § 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section [Pub. L. 99-509, § 1001, amending this section and enacting provisions set out as notes under this section].

7 U.S.C. § 1929a *note*, subsection (g); *Scioto Water*, 103 F.3d at 40. RWS #1 contends that it is entitled to the continued protection of § 1926(b) by virtue of "subsection (g)," because its repurchase of its notes under "subsection (f)" was a purchase of "obligations sold *or intended to be sold*" under 7 U.S.C. § 1929a *note*. The City disagrees, arguing that a sale of bonds or notes to the issuer under "subsection (f)" in which the issuer's debt to the United States is extinguished does not qualify the issuer for the continued protection of § 1926(b) under "subsection (g)."

b. Judicial interpretations

i. Scioto Water. In the only federal decision to consider the question of whether a bond issuer who buys

back its own bonds from the FmHA, thereby extinguishing those obligations to the United States, is entitled to the continued protection of § 1926(b), the Sixth Circuit Court of Appeals held that the issuer could no longer invoke the protection of the statute. *See Scioto Water,* 103 F.3d at 41-42. In *Scioto Water,* the Sixth Circuit Court of Appeals first considered the holding of the Colorado Supreme Court in *City of Grand Junction v. Ute Water Conservancy Dist.,* 900 P.2d 81 (Colo. 1995) (*en banc*), which was the only judicial decision it found, apart from the decision below, to consider the continued protection for a bond issuer under § 1926(b), where the bond issuer bought back its bonds pursuant to the 1986 OBRA. *Scioto Water,* 103 F.3d at 41. The Sixth Circuit Court of Appeals noted that the Colorado Supreme Court had found the bonds in the case before it had not been extinguished by the issuer's repurchase. *Id.* The Sixth Circuit Court of Appeals characterized the reasoning and holding of the Colorado court as follows:

> Because subsection (g) extended § 1926(b) protection to "all notes and other obligations sold or intended to be sold" under the Agricultural Credit Act, the court concluded that § 1926(b) protection should continue even if the bond issuer purchased its own bonds. [*Grand Junction,* 900 P.2d] at 92. The court believed that because subsection (f) gave bond issuers the "right of first refusal" before the Farmers Home Administration sold the bonds, and was placed in the same act with subsection (g), that Congress meant to create a "comprehensive scheme" that allowed bond issuers to maintain § 1926(b) protection even after they purchased their own bonds. *Id.* In reaching this conclusion, however,

> the court carefully observed that state law permitted a bond issuer to reacquire its own bonds without extinguishing the debt. *Id.* at 93.

Scioto Water, 103 F.3d at 41. The court in *Scioto Water*, however, found that when the bond issuer in the case before it bought back its bonds from the FmHA, the FmHA had marked the notes "paid in full." *Id.* at 42. The court found that the issuer's debt to the United States was discharged, not sold. *Id.* The court consequently found that the issuer was no longer indebted to the United States, and thus had lost the protections of § 1926(b), because it no longer qualified as a debtor for § 1926(b) protection. *Id.* The court wrote,

> This statutory interpretation is also faithful to one of the main legislative purposes in enacting § 1926(b) – safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid. We also note that Water 1's reliance on the common law "right of first refusal" does not alter this outcome, which must be gleaned from the federal statutes themselves rather than from such sources as Texas common law.

Scioto Water, 103 F.3d at 42.

Accepting the reasoning of the district court below, the Sixth Circuit Court of Appeals held that subsection (g) of § 1929a *note* applies only to obligations sold by the FmHA to third parties. *Id.* The Sixth Circuit Court of Appeals therefore affirmed the district court's dismissal of the plaintiff's action, holding that "having repurchased its own bonds, [the plaintiff] was no longer entitled to the

protection provided by § 1926(b) and had failed to state a claim for relief under that section of Title 7." *Id.*

The portion of the district court's unpublished opinion in *Scioto Water* to which the appellate court referred so favorably states as follows:

> Upon a careful reading of all the pertinent statutory provisions, the Court concludes that subsection (g) does not apply to obligations which a debtor has purchased from the FmHA under the debtor buy-out program. The applicable loan [sic] provisions recognize two types of obligations: (1) those to be sold to by the FmHA to third parties under § 1929a note, and (2) those to be offered to issuers for purchase under § 1929a note, as amended. Section 1929a note, as amended, subsection (f) differentiates between "a sale of a portfolio of notes or other obligations *under this section*" (referring to 1929a note, which provides only for the sale of FmHA notes to third parties), and an offer to sell to the purchaser [sic], the latter being an alternative which the Secretary must offer before conducting a sale "under this section." Provision (g) employs similar language, referring to "notes or other obligations sold or intended to be sold *under this section*." (emphasis added). Attributing the same meaning to the phrase under both provisions, the obligations to which (g) refers are those sold to third parties under § 1929a note, as distinguished from those offered for sale back to debtors. Thus construed, § 1929a note, as amended, extends the protections of § 1926(b) only to those obligations sold by the FmHA to third parties pursuant to the dictates of OBRA.

This interpretation of § 1929a note is consistent with the purpose of the statutory scheme. OBRA mandated that the Secretary generate specified net proceeds by selling notes and other obligations held by it. The extension of loan protections to third-party purchasers would assist the Secretary in satisfying the OBRA requirements by offering an inducement for third parties to purchase FmHA obligations. On the other hand, offering the same incentive to debtors who might wish to participate in the buy-out program would not necessarily further assist the Secretary in fulfilling the statutory mandates. This is so because the buy-out program offers another type of incentive for debtors to purchase their own loans; i.e., a reduction in the amount of debt owed to the FmHA. Accordingly, there is a rational basis for extending the protection of § 1926(b) to obligations sold by the FmHA to third parties, but not to those purchased by debtors through the buy-out program.

In addition, a debtor whose loan is sold by the FmHA to a third party has no control over the transaction and cannot be said to have voluntarily relinquished the benefits conferred by § 1926(b). It is reasonable that Congress desired to extend to a debtor in this situation the same protections the debtor would have received had the FmHA continued to own the debtor's obligation. In contrast, a debtor who opts to purchase its own loan at a discount acts of its own volition and can be said to have voluntarily relinquished any rights bestowed by FmHA ownership of the obligation, including the protection afforded by § 1926(b). These differences afford a rational basis for distinguishing

> between obligations sold to third parties and those bought back by debtors.
>
> Based on the foregoing, the court finds that § 1929a note, subsection (g), applies only to obligations sold by the FmHA to third parties. Accordingly, accepting Water 1's allegations as true, its bonds were not "sold or intended to be sold" within the meaning of § 1929a note, subsection (g), so as to entitle Water 1 to the protection against curtailment provided by § 1926(b). Because Water 1 is no longer indebted to the FmHA within the meaning of the pertinent statutory provisions, Water 1 has failed to state a claim for relief under § 1926(b).

Scioto County Regional Water Dist. No. 1, Auth. v. Scioto Water, Inc., et al., No. C-1-95-204, slip op. at 14-16 (S.D. Ohio Aug. 2, 1995).

Not surprisingly, RWS #1 takes issue with the holdings of the district and appellate courts in the Scioto Water case. RWS #1 contends that the proper analysis, and proper result, were stated by the Colorado Supreme Court in the *Grand Junction* decision. *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo. 1995) (*en banc*). Because this decision is the only other one to address the specific question that now troubles this court, the court will also consider it in some detail.

ii. Grand Junction. In the *Grand Junction* decision, the Colorado Supreme Court first held that § 1926(b) expressly preempts state law governing the authority of a public entity to provide domestic water service and held further that § 1926(b) and other applicable federal statutes implicitly preempt state law regulating the discharge of debt evidenced by a bond. *Grand Junction*, 900 P.2d at

87. This court will return to these holdings as necessary below. Turning to the question of more immediate interest here, of whether an issuer who repurchases its obligations from the FmHA is entitled to the continued protection of § 1926(b), the Colorado Supreme Court found that § 803(g) of the 1987 ACA, 7 U.S.C. § 1929a *note*, subsection (g), referred to here as "subsection (g)," "extends the protection of section 1926(b) to 'all notes or other obligations sold or intended to be sold under this section.' " *Id.* at 91. The court defined its task and forecast its conclusion as follows:

> We must determine whether Congress intended that "all . . . obligations sold . . . under this section" include reacquisition by an issuer of a bond held by the FmHA, *where the parties intended not to discharge the bond.* Because section 803(f) of the ACA provides a comprehensive scheme for selling bonds held by the FmHA back to the issuers, we conclude that Congress intended to authorize the type of transaction that occurred in the present case.

Grand Junction, 900 P.2d at 91 (emphasis added).

After identifying the rule of statutory interpretation that looks first to the plain language of the statute, the court concluded that the language of subsection (g) was unambiguous. *Id.* Specifically, the court found that the word "all" admitted no exceptions. *Id.* Therefore, the court found that subsection (g) "does not provide for any exception to the general rule that the protection provided to rural water districts under section 1926(b) 'shall be applicable to all notes or other obligations sold or intended to be sold under this section' " and the court

declined to create such an exception. *Id.* at 92. After considering the plain language of subsection (g), the court held "that [subsection (g)] authorized the FmHA to sell all notes or other obligations without removing the protection provided to rural water districts under section 1926(b), including selling the 1981 revenue bond back to the issuer when the parties intended that the bond remain outstanding." *Id.*

The court found further support for its conclusion in the fact that Congress had provided a comprehensive scheme for selling bonds back to issuers, and the purpose of § 1926(b), which the court identified as protecting the territory served by an association against expansion of municipalities and other public bodies. *Id.* One of the primary purposes of the 1987 ACA, the court found, was to "create an improved secondary market for FmHA loans," which was a purpose also served by extending the protection of § 1926(b) to bonds repurchased by an issuer with the intent not to discharge the instrument. *Id.*

Next, the court found support for its interpretation in state law. The court found that, under common-law principles, the intent of the parties dictates whether the reacquisition by the issuer of a bond that is also a negotiable instrument discharges the debt or functions simply as a purchase and sale of the instrument. *Id.* at 93. The court found that the intent of the parties in the case before it was to keep the revenue bonds active and not to discharge the debt after the district repurchased the instrument from the FmHA. *Id.* The court found that, "[a]lthough the FmHA had no further rights or obligations under the 1981 revenue bonds, neither the FmHA nor the District intended to discharge or cancel the

bond." *Id.* This conclusion was supported by expert testimony and documentary evidence, and by the instrument itself, which was not marked "paid in full," or otherwise cancelled or discharged; rather, the bond remained outstanding after the district reacquired the instrument. *Id.* at 93-94. Finally, the evidence was undisputed that the parties did not intend to cancel the debt. *Id.* at 94. Therefore, the court concluded, "state law principles, the evidence in the present case, and the district court's findings all support our conclusion that the District repurchased the bond without discharging the underlying debt." *Id.*

This court observes that the factual circumstances underlying the decision in *Grand Junction* are readily distinguishable from the circumstances in either Scioto Water or the present case, and consequently the *Grand Junction* decision may provide little guidance in the factual circumstances presented here. That factual difference is that the issuer in *Grand Junction* did not discharge its debt by repurchasing its notes from the FmHA. The holding of the Colorado Supreme Court in *Grand Junction* revolved around this factual distinction, because the court framed the question before it as whether bonds repurchased by the issuer, *but not discharged,* continued the issuer's protection under § 1926(b) through subsection (g). *Id.* at 91 ("We must determine whether Congress intended that 'all . . . obligations sold . . . under this section' include reacquisition by an issuer of a bond held by the FmHA, *where the parties intended not to discharge the bond*"; emphasis added). That question was not presented in *Scioto Water,* because the court found that the obligation in question *was* discharged. *Scioto Water,* 103 F.3d at 42. Similarly, the undisputed record in this case is that

RWS #1 in fact extinguished its bonds with FmHA when it bought them back.

Clearly, however, there is a split in authority between the *Grand Junction* and *Scioto Water* decisions on the legal question of whether subsection (g) extends the protections of § 1926(b) to "all" bonds sold by the FmHA, including bonds sold back to issuers, as the Colorado Supreme Court held, or whether the protections of § 1926(b) do not extend to bonds repurchased by the issuer, as the Sixth Circuit Court of Appeals held. Therefore, this court must first consider the proper interpretation of whether subsection (g) continues an issuer's protection under § 1926(b) only where a third party purchases an issuer's obligations from the FmHA or whether it also continues the issuer's protection when the issuer repurchases its obligation under subsection (f).

c. Plain meaning

In addition to favoring the analysis and conclusions of the Colorado Supreme Court in *Grand Junction* based on what that court found the plain meaning of subsections (f) and (g) of § 1929a *note* to be, RWS #1 contends that the district and appellate courts in *Scioto Water* erred by failing to consider the legislative history of § 1929a *note*, which RWS #1 asserts supports the conclusion that § 1926(b) protection was meant to continue whether obligations were resold to the issuer or to a third party. The City counters that, whatever individual members of Congress may have intended, the intent of Congress in enacting § 1926(b) and § 1929a *note* is apparent from the plain language of those statutes, which the City contends

plainly states that § 1929a *note* does not extend the protection of § 1926(b) to any obligor who repurchases its notes from the FmHA pursuant to subsection (f), whether or not the obligor thereby extinguishes its debt to the FmHA. The court must decide whether the meaning of § 1929a *note*, as amended, is plain.

*i. **Rules for "plain meaning" construction.*** "The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1165 (8th Cir. 1995) (citing *Ron Pair*); *United States ex rel. Harlan v. Bacon*, 21 F.3d 209, 210 (8th Cir. 1994) ("When construing a statute, we are obliged to look first to the plain meaning of the words employed by the legislature . . . ") (citing *Chevron*, 467 U.S. at 842-43); *United States v. Manthei*, 979 F.2d 124, 126 (8th Cir. 1992) ("When interpreting statutory language, the court must first look to the plain meaning of the language," citing *North Dakota v. United States*, 460 U.S. 300, 312-13 (1983)). The Supreme Court describes this rule as the "one, cardinal canon before all others." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Thus, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* (citing *Ron Pair*, 489 U.S. at 241-42; *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68, 3 L. Ed. 150 (1810)).

When the language of the statute is plain, the inquiry also ends with the language of the statute, for in such instances "the sole function of the courts is to enforce [the

statute] according to its terms." *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *Union Elec.*, 64 F.3d at 1165 (quoting *Ron Pair*); *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1502 (8th Cir. 1992) (plain meaning of a statute governs over ambiguous legislative history, citing *Ron Pair Enterprises*). The plain meaning of a statute is decisive, "except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Ron Pair*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment) (ordinary meaning governs unless implementing it would be "patent absurdity"); *Waugh v. Internal Revenue Serv.*, 109 F.3d 489, 493 (8th Cir. 1997) (quoting *Ron Pair*); *Missouri v. L.J. O'Neill Shoe Co.*, 64 F.3d 1146, 1150 (8th Cir. 1995); *Union Elec.*, 64 F.3d at 1165.

However, "[p]lain meaning, like beauty, is sometimes in the eye of the beholder," *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). Thus, the court must not reach its decision about the meaning of a statute

> by a strict construction of the words of the Act, nor by application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction. But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made.

Bacon, 21 F.3d at 210-11 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941)). Thus, the court must assume that the words of a statute, construed in their ordinary meaning, accurately express the legislative purpose, and the court should decline to frustrate the plain meaning of the words chosen by the legislature. *United States v. Talley*, 16 F.3d 972, 976 (8th Cir. 1994).

ii. Plain meaning of subsection (f). Section 1929a *note* originally provided for the sale of notes and other obligations by the Secretary of Agriculture, pursuant to the 1986 OBRA. 7 U.S.C. § 1929a *note*, subsections (a)-(e). Subsection (f), added by later amendment, provides for the offer of bonds to an issuer "*[b]efore* conducting a sale of a portfolio of notes or other obligations under this section." 7 U.S.C. § 1929a *note*, subsection (f). The word "before" clearly indicates that a sale to the issuer under subsection (f) is a sale separate from and preliminary to a sale to a third party under subsections (a)-(e). Thus, the plain meaning of subsection (f) is that the offer to the issuer is a *prerequisite* to a "sale . . . under this section," meaning a sale authorized and conducted as stated in subsections (a)-(e); a sale under subsection (f), however, *is not* a "sale . . . under this section," because it is not a sale under subsections (a)-(e).

To put it another way, the way of the United States District Court for the Southern District of Ohio,

> The applicable [statutory] provisions recognize two types of obligations: (1) those to be sold to by the FmHA to third parties under § 1929a note, and (2) those to be offered to issuers for

> purchase under § 1929a note, as amended. Section 1929a note, as amended, subsection (f) differentiates between "a sale of a portfolio of notes or other obligations *under this section*" (referring to § 1929a note, which provides only for the sale of FmHA notes to third parties), and an offer to sell to the [issuer], the latter being an alternative which the Secretary must offer before conducting a sale "under this section".

Scioto County Regional Water Dist. No. 1, Auth., No. C-1-95-204, slip op. at 14-15. This court holds, based on the plain meaning of the statute, that a sale under subsection (f) is not a "sale under this section [§ 1929a *note*, subsections (a)-(e)]," but a prerequisite to such a sale. If a sale to the issuer pursuant to subsection (f) is consummated during the thirty day "hold open" period provided for the issuer to accept the offer to buy back its obligations under subsection (f)(1)(B), no "sale under this section," that is, no sale under § 1929a *note*, subsections (a)-(e), ever takes place.

*iii. **Ambiguity of subsection (g).*** The next question is whether subsection (g) extends the protection of § 1926(b) to *both* kinds of sales, a sale to a third party under § 1929a *note*, subsections (a)-(e), and a sale to the issuer under subsection (f). Subsection (g), like subsection (f), refers to a sale "under this section." 7 U.S.C. § 1929a *note*, subsection (g). Use of the same terms in subsections adopted at the same time does, indeed, suggest that those terms were intended to have the same meaning in each subsection, which would be that subsection (g) applies only to a sale to a third party under subsections (a)-(e).

However, subsection (g) refers to "all notes or obligations sold *or intended to be sold* under this section." 7 U.S.C. § 1929a *note*, subsection (g). RWS #1 argues strenuously that notes sold to issuers under subsection (f) are notes "intended to be sold" under § 1929a, subsections (a)-(e), even though the obligations are instead sold to the issuer under subsection (f). In short, RWS #1 contends that "if the note is selected, the note is protected." Rural Water System No. 1's Response To Defendant City of Sioux Center's Motion For Summary Judgment (hereinafter, "RWS #1 Brief In Resistance To Summary Judgment") at 9. The City responds that the "intended to be sold" language simply doesn't apply to debts paid off by the issuer, citing the *Scioto Water* decisions for interpretations that hold subsection (g) doesn't apply to sales to debtors under subsection (f). The City contends further that RWS #1's argument strains logic and the language, because if Congress wanted the protections of § 1926(b) to extend to water associations that are no longer indebted to the United States, it could have found a less obscure way to say so than by implication from "intended to be sold." What the City contends is a "natural rendition" of the language, therefore, is that "intended to be sold" is simply a statement that putting a note up for sale does not impact the quality of the note or security. The City describes RWS #1's interpretation as giving a "magical afterlife" to debts that have been paid off by allowing them to continue the protections of § 1926(b). Defendant's Memorandum Of Law In Support Of Combined Resistance To Plaintiff's Motion For Summary Judgment Under 7 U.S.C. § 1926(b) And 42 U.S.C. § 1983 (hereinafter, "Defendant's Combined Resistance Brief"), p. 9.

Although the parties have framed the question in terms of selecting between interpretations of subsection (g) based on the "selected-protected" concept or rejection of a "magical afterlife," the crux of the matter, as the court sees it, is whether subsection (g) is ambiguous. " 'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 449 (8th Cir. 1997) (quoting *Robinson v. Shell Oil Co.*, ___ U.S. ___, ___, 117 S. Ct. 843, 846 (1997)).[11] The Eighth Circuit Court of Appeals has explained in somewhat more detail how ambiguity is determined, as follows:

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[11] The Eighth Circuit Court of Appeals has observed that " '[t]he plain meaning of a statute controls, if there is one, regardless of an agency's interpretation.' " *Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir. 1996) (quoting *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996)). In this case, the City contends that the Department of Agriculture has taken the position that rural water districts that pay off notes are not protected by § 1926(b), citing the district court's decision in *Scioto Water*. However, in that district court opinion, in a footnote, the court expressed some doubt that it should defer to an agency opinion expressed in an informal letter from the Office of General Counsel for the Department of Agriculture to counsel for one of the parties before the court. *Scioto Water*, slip op. at 14 n.8. The district court simply noted that its own independent analysis was in conformity with the Department of Agriculture's informal interpretation. *Id.* This court has the same doubt that any adequate expression of an agency interpretation has been presented, and will therefore conduct its own analysis of the statutes in question without further reference to any agency view.

> "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, ___, 115 S. Ct. 552, 555, 130 L. Ed. 2d 462 (1994). In other words, "the meaning of statutory language, plain or not, depends on context." *Id.* (internal quotation omitted). As the parties remind us, "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Hennepin County Med. Ctr. [v. Shalala]*, 81 F.3d [743,] 748 [(8th Cir. 1996)] (internal quotation omitted). At the same time, we must "seek to interpret the statute in a way that includes every word and clause." *Id.*

Pelofsky v. Wallace, 102 F.3d 350, 353 (8th Cir. 1996). Certainly, RWS #1's interpretation is a "definitional possibility" for the meaning of "intended to be sold." *Id.* However, that interpretation is unconvincing in light of context, object, and policy of the relevant statutes. *Id.*; *accord Lovilia Coal Co.*, 109 F.3d at 449 (ambiguity must be determined from context).

As to context, the original portion of § 1929a *note*, subsections (a)-(e), authorizes the sale of notes and establishes the requirements for such sales. 7 U.S.C. § 1929a *note*, subsections (a)-(e). Subsection (f), however, establishes as a prerequisite to any such sale an offer by the FmHA to sell notes to the issuer. 7 U.S.C. § 1929a *note*, subsection (f). Only when the time for the exercise of the issuer's right to buy the notes under subsection (f) has run can the FmHA sell the notes pursuant to § 1929a *note*, subsections (a)-(e). As a consequence, this court's reading is that only when the time for exercise of rights under subsection (f) has run, only when the prerequisites have

been completed, can the FmHA *intend* to sell the notes pursuant to subsections (a)-(e). Until the thirty days provided in subsection (f)(1)(B) have run, the FmHA *intends* to sell the notes to the issuer pursuant to subsection (f), not to any other interested party pursuant to subsections (a)-(e). Thus, in subsection (g), the words "sold or intended to be sold under this section" refer, as the City suggests, most naturally to notes actually sold under § 1929a *note*, subsections (a)-(e), or intended to be sold, meaning offered but not yet sold, under subsections (a)-(e), not to notes sold or intended to be sold to the issuer under subsection (f). Notes sold to the issuer under subsection (f) are neither notes "sold . . . under this section," meaning pursuant to subsections (a)-(e), because they have instead been sold under subsection (f), nor are they notes "intended to be sold under this section," because they have already been sold under subsection (f). Thus, in context, notes "intended to be sold under this section" can only mean notes offered for sale pursuant to subsections (a)-(e), but not yet purchased, or notes offered for sale pursuant to subsections (a)-(e), but never purchased at all, and thus still in the hands of the FmHA.

Also relevant to the context of subsection (g) is the difference between the terms of a sale "under the statute," meaning a sale under subsections (a)-(e), and a sale instead under the prerequisite offer to the issuer under subsection (f). A sale under subsections (a)-(e) does not change the terms of the issuer's obligations. 7 U.S.C. § 1929a *note*, subsection (c) ("any sale of notes or other obligations, as described in subsection (a), shall not alter the terms specified in the note or other obligation. . . . ").

Such a sale thus changes only the party to whom the issuer is indebted. As the district court in *Scioto Water* observed,

> [A] debtor whose loan is sold by the FmHA to a third party has no control over the transaction and cannot be said to have voluntarily relinquished the benefits conferred by § 1926(b). It is reasonable that Congress desired to extend to a debtor in this situation the same protections the ~~debtor~~ would have received had the FmHA continued to own the debtor's obligation.

Scioto Water, slip op. at 16. However, where the issuer instead exercises its rights under subsection (f) to buy back its notes, it does so at a discount. *See* 7 U.S.C. § 1929a *note*, subsection (f)(2)(B). Furthermore, the terms of the note are also altered, to the extent the note is entirely extinguished. Not only are the terms of the note altered, because the note is extinguished, but the terms of the *debt* of the issuer may also be significantly changed, because, pursuant to subsection (f)(3)(B), the nature of the issuer's financing in order to effect the repurchase of bonds is not to be considered by the Secretary. 7 U.S.C. § 1929a *note*, subsection (f)(3)(B). This provision is in stark contrast to the terms of § 1929a *note*, subsection (c), which forbids the alteration of terms of the *note* when it is sold pursuant to subsections (a)-(e). 7 U.S.C. § 1929a *note*, subsection (c).

Because of the benefit of repurchase at a discount, it is not irrational, as RWS #1 suggests, for an indebted association to buy back its notes and forego the protections of § 1926(b). *See Scioto Water*, slip op. at 15. Rather, it is irrational to read subsection (g) as including notes sold

under subsection (f) within a strained reading of notes "intended to be sold under this section," when a sale under subsection (f) involves significantly different timing and terms from a sale under subsections (a)-(e).

This reading of subsection (g) is also in keeping with the object and policy of the subsection. *Pelofsky*, 102 F.3d at 353 ("object and policy" are relevant to a determination of plain meaning or ambiguity, citing *Hennepin County Med. Ctr.*, 91 F.3d at 748). The object of subsection (g) was patently to make applicable the protections of § 1926(b) to certain notes sold by the FmHA pursuant to the 1986 OBRA sell-off program. *See* 7 U.S.C. § 1929a *note*, subsection (g) (stating that section § 1926(b) "shall be applicable" to certain notes affected by § 1929a *note*). To ascertain precisely what policy motivated this subsection, logic dictates that the court should also examine the object and policy of the statute, § 1926(b), that subsection (g) makes applicable to the new circumstances created by the 1986 OBRA.

The policy behind § 1926(b), as explained above, is "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and [Farmers Home Administration's] loans) by protecting them from the expansion of nearby cities and towns." *Bear Creek Water Ass'n*, 816 F.2d at 1060; *accord Scioto Water*, 103 F.3d at 40 (quoting *Bear Creek*); *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 233 (also citing *Bear Creek*); *North Alamo Water Supply Corp.*, 90 F.3d at 915 (also citing that Circuit Court of Appeals' prior decision in *Bear Creek* for the purposes of the statute); *CSL Utils., Inc.*, 16 F.3d at

137. However, the scope of that policy was clearly identified in § 1926(b) itself, because that statute affords its protections only *"during the term of [a FmHA] loan."* 7 U.S.C. § 1926(b) (emphasis added); *Scioto Water*, 103 F.3d at 42 (courts have consistently noted the requirement of § 1926(b) that an association be indebted to the United States in order to obtain the protections of that subdivision); *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235 (describing indebtedness to the FmHA as one of the "threshold requirements" for protection under § 1926(b), along with "having 'made service available' in the area"); *CSL Utils., Inc.*, 16 F.3d at 133. Thus, reading subsection (g) to extend protection of § 1926(b) only to associations that remain indebted on the same obligation, albeit an obligation now held by a third party, is more in keeping with the object and policy of the underlying statute than is extending protections of the underlying statute to an issuer no longer indebted on the same obligation, let alone one no longer indebted to the United States.

RWS #1 contends that the policy of § 1926(b) is also served by extending its protections to an association that has bought out its notes with the FmHA under subsection (f) by incurring new debt from some other source. The court is unpersuaded by this argument, however, because the companion policy of § 1926(b), to protect the United States as the holder of the issuer's note, is not served. *See Scioto Water*, 103 F.3d at 40 (one purpose of § 1926(b) is "to safeguard the viability and financial security of such associations (*and [Farmers Home Administration's] loans*) by protecting them from the expansion of nearby cities and towns," citing *Bear Creek Water Ass'n*, 816 F.2d at 1060); *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 233

(§ 1926(b) was enacted "[i]n order to encourage rural water development by expanding the number of potential users and *to safeguard the financial viability* of rural associations *and Farmers Home Administration loans.*"). The purpose of § 1926(b) is not to protect a rural water association at all costs; rather, it is, under the terms of § 1926(b) itself, to protect a rural water association indebted to the United States and the United States as its creditor, or, by virtue of the 1987 ACA, to protect a rural water association indebted to one standing directly in the shoes of the United States as a purchaser of the notes of a rural water association and that new creditor. As the Seventh Circuit Court of Appeals explained in *Jennings Water,* "[T]he primary beneficiaries of section 1926(b)'s ban on association service curtailment are *not the associations themselves,* but rather, *the FmHa* and the individual rural consumers who would not have inexpensive and reliable water service *without FmHA-supported* rural water associations." *Jennings Water, Inc.*, 895 F.2d at 317 (emphasis added).

Although RWS # 1 incurred new debt to buy out its notes held by the United States, the party to whom RWS # 1 became indebted on the new debt did not stand in the shoes of the United States. The new creditor held an entirely different obligation with substantially altered terms from those found in the note held by the United States. *Cf.* 7 U.S.C. § 1929a *note,* subsection (c) (sale under subsections (a)-(e) must not alter the terms of the loan agreement). That new creditor here, Norwest Bank in Minneapolis, Minnesota, accepted an entirely different obligation from RWS # 1 and took no security whatsoever on the new debt.

RWS # 1 has enjoyed the advantages of the buy-out by obtaining the preferential terms of subsection (f)(2)(B), as well as the advantage of substituting unsecured loans from Norwest Bank for secured loans from the United States. RWS # 1 has identified nothing in the language, context, object, or policy of either § 1926(b) or § 1929a *note*, as amended, that requires a reading of subsection (g) to give RWS # 1 all of the advantages of § 1926(b) as well as the advantages of subsection (f)(2)(B) of § 1929a *note*, nor does the court find subsection (g) ambiguous, such that it reasonably could encompass the meaning RWS # 1 attributes to it.

d. Legislative history

Finally, the court will consider the legislative history RWS # 1 asserts is of such importance to a proper interpretation of subsections (f) and (g). Under normal canons of statutory interpretation, the court takes recourse to legislative history only after determining that the statutory language is ambiguous. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (noting that "appeals to legislative history are well taken only to resolve 'statutory ambiguity' "); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *Coplin v. Fairfield Pub. Access Television Committee*, ___ F.3d ___, ___, 1997 WL 209461, *12 (8th Cir. April 30, 1997) ("We need not interpret the legislative history of the Cable Act because its statutory language is clear."); *Citicasters v. McCaskill*, 89 F.3d 1350, 1354-55 (8th Cir.

1996) (citing *Northern States, infra*); *Northern States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir.) ("We think that when, as here, the statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 168 (1996); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995) (when the statutory language is not ambiguous, there is "no need to search for clues to Congress' intent in the legislative history"). The court has not found subsection (g) (or subsection (f)) to be ambiguous. However, quite recently, the Eighth Circuit Court of Appeals considered legislative history in the alternative after finding that the statutory term in question in the case before it was not ambiguous. *See Lovilia Coal Co.*, 109 F.3d at 449 (finding statutory term "claim" unambiguous, but observing that, even if the term in question was ambiguous, the legislative history made clear that the appropriate interpretation was as the court had found from the plain meaning of the statute); *accord Bear Creek*, 816 F.2d at 1059-60 (finding that "[w]hile we need not resort to legislative history where, as here, the statutory language is unambiguous and yields no absurd result, . . . we note that our interpretation of § 1926(b) comports with the purposes found in its legislative history").

Although RWS # 1 has included in its submissions on the cross-motions for summary judgment a substantial bound "Legislative Folio," RWS # 1 considered at length in its briefing only one excerpt as supportive of its interpretation of subsection (g). That excerpt is the comments of Senator Boren, the sponsor of the amendment that

became subsection (g). The pertinent portion of Senator Boren's comments is as follows:[12]

> Mr. BOREN. Mr. President, I send to the desk an amendment and ask for its immediate consideration. . . .
>
> Mr. President, this amendment [subsection (g)] which I have sent to the desk will ensure that the provision in current law which prohibits the curtailment or limitation of service of rural water associations would continue to be applicable to any note or obligation sold, or intended to be sold, by the Secretary of Agriculture.
>
> Under section 306(b) [7 U.S.C. § 1926(b)] of the Consolidated Farm and Rural Development Act, the area served by an association receiving a rural water and sewer loan cannot be curtailed or limited by inclusion of the area within the boundaries of any municipal corporation or other public body, or by granting any private franchise for similar service within the same area during the term of the rural water and sewer loan.
>
> As my colleagues will recall, section 1001 of the Omnibus Budget Reconciliation Act of 1986 [7 U.S.C. § 1929a note, then consisting of subsections (a)-(e)] requires the Secretary of Agriculture to sell rural water and sewer loans during fiscal years 1987 through 1989. *While the act specifically prohibits the alteration of the terms specified*

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[12] The excerpt quoted here by the court is rather more complete than the excerpt quoted by RWS # 1 in briefing, and the court finds the additional portions it has included particularly significant.

> *in the loan if the loan is sold, apparently a question has recently been raised with respect to the ability of the Farmers Home Administration to enforce the applicability of section 306(b) of the Consolidated Farm and Rural Development Act once the loan is sold.*
>
> *To clarify this issue, this amendment will specifically provide that the provisions of section 306(b) would be applicable to all loans sold, or intended to be sold, by the Secretary or* [sic] *Agriculture.*
>
> I understand that the Department of Agriculture has no objection to this amendment, which is a clarifying amendment. I also understand that it has been cleared on both sides of the aisle and, therefore, Mr. President, I urge the acceptance of the amendment.

133 CONG. REC. S.16918 (daily ed. Dec. 2, 1987) (statement of Sen. Boren) (emphasis added). Although, as RWS # 1 points out, subsection (f) had already been introduced in the House as a proposed amendment, and had passed that body, when Senator Boren offered the amendment that became subsection (g), Senator Boren did not couple his amendment to subsection (f) when he introduced that amendment. Rather, his reference to the context of subsection (g) is to "section 1001 of the Omnibus Budget Reconciliation Act of 1986," *id.*, the *unamended* portion of § 1929a *note* consisting of subsections (a)-(e).

Indeed, from the entirety of Senator Boren's comments quoted above, it is clear to this court that the senator was relating his amendment only to a sale of notes to a third-party as contemplated by the unamended version of § 1929a *note*. First, Senator Boren explained that the 1986 OBRA requires the sale of notes, and that

"the act specifically prohibits the alteration of the terms specified in the loan if the loan is sold." *Id.* That limitation is found in subsection (c) of § 1929a *note*, which specifically states that its limitation on alteration of terms applies to sales "described in subsection (a)." 7 U.S.C. § 1929a *note*, subsection (c) ("[A]ny sale of notes or other obligations, as described in subsection (a), shall not alter the terms specified in the note or other obligation, except that, on sale, a note or other obligation shall not be subject to the provisions of section 333(c) of the Consolidated Farm and Rural Development Act [section 1983(c) of title 29]."). The manner in which the amendment appears to be a "clarifying" one, as the court reads this excerpt of legislative history, is to clarify that the prohibition on alteration of the terms of the loan as a result of a sale pursuant to subsection (a) should be read to include the continued viability of the protections of § 1926(b) for loans sold under subsection (a). There is simply no reason to be concerned about a prohibition on the alteration of terms of a loan when the loan is not sold to a third party, but is instead sold to the issuer and thereby extinguished. Second, the senator offers no explanation whatsoever of the meaning of "intended to be sold." Certainly, the senator does not tie "intended to be sold" to a prerequisite sale under subsection (f). Instead, he again uses that phrase only in relation to a sale under subsection (a) to indicate that the terms of the loan are not altered by the sale or prospective sale. Third, this portion of legislative history demonstrates persuasively that subsection (g) follows subsection (f) only by virtue of the order in which the amendments were engrafted onto the 1986 OBRA

buy-out program during the legislative session that produced the 1987 ACA, not by virtue of any intent that subsection (g) include subsection (f) within its protections.

Consequently, the court cannot conclude that this portion of the legislative history requires a different reading of subsection (g). If anything, Senator Boren's comments show that subsection (g) was intended to relate only to a sale under subsections (a)-(e), not to a prerequisite sale to the issuer under subsection (f) in which alteration of terms of the loan as a result of the sale is irrelevant, because the debt is extinguished. Furthermore, although the court has combed through the additional portions of the legislative history found in RWS # 1's legislative folio, and considered the inferences RWS # 1 asserts in its briefing should arise from the legislative history, the court finds nothing in the legislative history either clearly supportive of RWS # 1's interpretation of subsection (g) or plainly contrary to the court's.

e. RWS # 1's entitlement to § 1926(b) protection

The court can only conclude from (1) what the court finds to be the unambiguous, "plain meaning" interpretation of subsections (f) and (g), in light of the language, context, object, and policy of those subsections, *see Pelofsky*, 102 F.3d at 353 (ambiguity is determined from context, object, and policy); *accord Lovilia Coal Co.*, 109 F.3d at 449 (ambiguity must be determined from context), and (2) the support for its reading the court garners from

the legislative history, and the lack of contrary indications in that legislative history, *see Lovilia Coal Co.*, 109 F.3d at 449 (observing that legislative history made clear that the court's "plain meaning" reading of terms found not to be ambiguous was correct), that the protection of § 1926(b) through subsection (g) does not extend to a party such as RWS # 1 who bought back its notes pursuant to subsection (f), and thereby extinguished them.[13] Consequently, RWS # 1 lost the protections of § 1926(b) when it bought back its notes in 1988 and did not regain any protection of § 1926(b) until RWS # 1 again became indebted to the United States in 1992.

As a consequence of this conclusion, RWS # 1 simply cannot state a claim that the City violated § 1926(b) when it annexed portions of the disputed territory in 1989. RWS # 1 simply had no protection of § 1926(b) to assert against that annexation. Furthermore, the court need never reach RWS # 1's first preemption argument, which is that even if state law permitted the City's expansion to its 1989 city

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[13] Whether the court would reach a different conclusion, as did the Colorado Supreme Court in Grand Junction, if RWS # 1 had repurchased its notes without extinguishing them or intending to extinguish them, is a matter that is simply too speculative to consider in light of a record revealing no genuine issue of material fact that RWS # 1 ceased to be indebted on the obligations it bought back from the United States. Here, it suffices to say that the court is not persuaded by the Colorado Supreme Court's reading of subsection (g) as applying to any sale of notes pursuant to the 1986 OBRA as amended by the 1987 ACA, including a sale to an issuer under subsection (f), rather than simply to sales to third parties under subsection (a) of § 1929a note, as held by both the federal district and appellate courts in *Scioto Water*.

limits, superior federal law, in the form of § 1926(b), forbade such an expansion. As a matter of *federal* law, as the court has construed the applicable statutes, RWS # 1 simply had no preemptive federal rights to assert against that expansion by the City, even if that expansion curtailed RWS # 1's then-existing service area. The City is therefore entitled to summary judgment in its favor on any part of any claim in which RWS # 1 asserts that the City's expansion to its 1989 city limits involved a curtailment or limitation of RWS # 1's service area in violation of § 1926(b), as well as concomitant summary judgment in its favor that its expansion to its 1989 city limits *did not* constitute a violation of § 1926(b). RWS # 1's motions for summary judgment will therefore be denied in pertinent part, and the City's motion for summary judgment will be granted in pertinent part.

However, questions remain for disposition on the cross-motions for summary judgment filed by the parties. The over-arching question among these becomes, what was the extent of RWS # 1's protection under § 1926(b) as of July 1, 1992, when RWS # 1 again took out a loan from the FmHA? That issue, just as hotly contested as the last, is addressed in the next section.

2. *Has the City violated or threatened to violate § 1926(b)?*

As the Sixth Circuit Court of Appeals recently observed,

> Section 1926(b) has been construed as "unambiguously prohibit[ing] any curtailment or limitation of an FmHA-indebted water association's

> services resulting from municipal annexation or inclusion." *Bear Creek Water Assoc., Inc.*, 816 F.2d at 1059. The statutory language "indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." *Id.*

Lexington-South Elkhorn Water Dist., 93 F.3d at 235. The Fifth Circuit Court of Appeals describes the protections afforded by § 1926(b) much more succinctly: "The service area of a federally indebted water association is sacrosanct." *North Alamo Water Supply Corp.*, 90 F.3d at 915; *Wayne*, 36 F.3d at 527 ("Courts have uniformly understood [§ 1926(b)] as forbidding [municipal] encroachment."); *Jennings Water*, 895 F.2d at 314 ("The statute explicitly prohibits municipal encroachment on a rural water association's service area by means of annexation or grant of private franchise."); *Glenpool Utility Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988) (same), *cert. denied*, 490 U.S. 1067 (1989); *Bear Creek*, 816 F.2d at 1059 (same).

a. Elements of a claim for violation of § 1926(b)

In order to prevail on a claim that a municipality or other entity has violated § 1926(b), a rural water association such as RWS # 1 must establish the following elements: (1) it is an "association" within the meaning of the Act; (2) it has a qualifying outstanding FmHA loan obligation; and (3) it has provided or made service available in the disputed area. *Lexington-South Elkhorn Water Dist.*, 93

F.3d at 234; *accord North Alamo Water Supply Corp.*, 90 F.3d at 915 (identifying the elements of the claim as "(1) [the association asserting protection] has a continuing indebtedness to the FmHA, and (2) the [opposing party] has encroached on an area to which the [protected association] 'made service available.' "). The parties do not dispute that RWS # 1 is an "association" within the meaning of the act. *See, e.g., Lexington-South Elkhorn Water Dist.*, 93 F.3d at 234 (citing 7 U.S.C. § 1926(a)(1) & (13), and 7 C.F.R. § 1942.17(b)(1), as establishing the identity of an "association" within the meaning of § 1926(b)). Nor do the parties dispute that, at least as of July 1, 1992, RWS # 1 had a qualifying outstanding loan obligation to the FmHA. *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235 (describing indebtedness to the FmHA as one of the "threshold requirements" for protection under § 1926(b), along with "having 'made service available' in the area"); *North Alamo Water Supply Corp.*, 90 F.3d at 915 (identifying "indebtedness to the FmHA" as one of the elements of a claim of violation of § 1926(b)). Thus, the element of RWS # 1's claims that is at issue is whether RWS # 1 has provided or made service available in the disputed area. *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 234 (identifying this as the third element of a claim of violation of § 1926(b)).

b. "Made service available"

Although the federal regulations explain that an association must "provide adequate service to all persons within the service area who can feasibly and legally be served," 7 C.F.R. § 1942.17(n)(2)(vii), "neither the statute

nor the regulations specifically defines the terms 'provided' or 'made available.' " *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235. The lack of applicable statutory or regulatory definitions, however, does not leave the court wholly without guidance on this question.

i. Tests. Recent decisions indicate that courts must "look to the law governing the way in which a water district must provide service to potential customers to determine whether [a qualifying association] has provided or made service available in the disputed areas." *Id.* Courts have routinely looked to applicable state law to make that determination. *See, e.g., id.* (looking to Kentucky law establishing certification prerequisites for water districts to provide service in an area to determine where a water district has "made service available"); *North Alamo Water Supply Corp.*, 90 F.3d at 913 (in a similar inquiry, noting that the association had obtained the certificate of convenience and necessity required under Texas law in order to serve an area). Thus, the first test, or first prong of the test, of "made service available" looks at legal authority to provide service. Courts have also routinely looked to the proximity of the water association's distribution lines to the areas in dispute. *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235. This latter test has been referred to by the parties and *amicus* in this case as the "pipe-in-the-ground test." The point of this test, or prong of the test, is that whether an indebted association has "made service available" also depends upon physical ability to provide water services.

Thus, the question of whether an association has "made service available" involves both whether service is physically available, "by virtue of [the association's] line

adjacent to property," and whether an association has legal rights and responsibilities to provide such service, as determined by applicable law. *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235; *Glenpool Utility Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989). A recent decision of the Sixth Circuit Court of Appeals demonstrates the interplay of these two requirements, a legal right to serve and physical ability to serve.

ii. Interplay of legal right and physical ability to serve. In *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235, the Sixth Circuit Court of Appeals first considered the complaining association's legal right to provide service in the disputed territory:

> Lexington-South Elkhorn admits that it has not obtained a Certificate of Public Convenience and Necessity from the Kentucky Public Service Commission to construct facilities or to serve customers within portions of the disputed areas, and has had no requests for service from potential customers in the areas at issue. In our view, these concessions distinguish this case from other cases in which courts have upheld water districts' rights to Section § 1926(b) protection from municipal encroachment based on the fact that the water districts were actually and actively providing service, or clearly had made service available.

Lexington-South Elkhorn Water Dist., 93 F.3d at 235-36. Thus, the court first determined that the association had no legal right or responsibility to provide water service in the disputed territory. In the alternative, the court also

found that the association had no actual, physical ability to provide water in the disputed area. *Id.* at 236. After surveying cases applying the "physical ability" or "pipe-in-the-ground test," the court wrote,

> These cases teach that whether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section § 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section § 1926(b) protection. Based on the location of Lexington-South Elkhorn's distribution lines, it had not made service available prior to the time that Wilmore began providing service to the disputed properties. Thus, although the Water District qualifies as an "association" and has an outstanding qualifying loan, it is unable to show that it has provided service or made service available in the disputed areas, and is therefore not entitled to the Section § 1926(b) protection that might otherwise have been available.

Lexington-South Elkhorn Water Dist., 93 F.3d at 236-37. The requirement of both a legal right or responsibility to serve and a physical ability to serve were reiterated in the court's conclusion:

> In sum, an association's ability to serve is predicated on the existence of facilities within or adjacent to a disputed property. By its clear terms, Section § 1926(b) does not provide an automatic, exclusive right to serve, but rather provides protection only if certain conditions

> are met. Among those conditions are that an association has at least made service available. *In this case, Lexington-South Elkhorn has not established its authorization to serve the disputed properties or its ability to provide the service. Not having facilities available, and not having requested authority from the Public Service Commission to construct facilities, Lexington-South Elkhorn's availability of service is merely speculative.*

Lexington-South Elkhorn Water Dist., 93 F.3d at 238 (emphasis added). The court therefore held that the association asserting § 1926(b) protection was ineligible for such protection. *Id.*[14]

Perhaps taking the relationship between legal authority to serve and physical ability to serve one step further, the Fifth Circuit Court of Appeals has held that a state law duty to provide service is the legal equivalent to the physical ability to "make service available" under § 1926(b). *North Alamo Water Supply Corp.*, 90 F.3d at 916 (identifying the "legal" and "factual" determinations of right and physical ability to serve an area as "alternatives"). This court concurs in that conclusion, but concludes further that, where state law *prohibits* an association from providing service in a disputed area, the association cannot rely upon its actual provision of service, or physical ability to provide service, as *trumping* its

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[14] Consequently, the court never reached the question of whether the district court erred in failing to define the specific service area of the association in which it was entitled to § 1926(b) protection, among other questions raised by the parties. *Id.*

lack of legal authority to provide service, absent a showing of estoppel or some other impediment to the assertion of the state-law prohibition. Rather, a legal right and responsibility to serve an area may stand alone as fulfilling the "made service available" requirement of § 1926(b),[15] *see id.*, but having pipes in the ground, standing alone, does not. Where an association relies on its physical ability to serve, having pipes in the ground, it must also have the legal right and responsibility to serve. In other words, this court finds that the "pipes-in-the-ground test" is not the exclusive test for determining an indebted association's protected service area. This is so, for several reasons.

First, the Secretary of Agriculture has interpreted an indebted association's authority to provide water service in a way that sheds light on the scope of § 1926(b) protection. Under federal regulations, an indebted association is authorized, indeed required, "[t]o provide adequate service to all persons within the service area who can feasibly *and legally* be served." 7 C.F.R. § 1942.17(n)(2)(vii) (emphasis added); *see also Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235 (identifying this regulation as related to, but not defining, the meaning of

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[15] Although the court agrees with the Fifth Circuit Court of Appeals on this issue, the court does have before it any such question in the factual circumstances of this case. Here, in no part of the disputed territory does RWS # 1 rely solely on its legal right or responsibility to serve. RWS # 1 does, however, rely exclusively on its physical ability to serve parts of the disputed area annexed by the City during the period RWS # 1 was not indebted to the FmHA as justifying revivification of its § 1926(b) protections for the annexed area.

"made service available" in § 1926(b)). Where an indebted association has no legal right to provide service, it is not required by the regulation to provide such service, and, logically, it also should not obtain protection from § 1926(b) for its illegal provision of service. Second, construing "made service available" to mean "legally made service available" may effectively avoid Tenth Amendment questions. *See Cotto Waxo Co. v. Williams*, 46 F.3d 790, 792 (8th Cir. 1995) (recognizing as a canon of statutory construction that the court should interpret a statute so as to uphold its constitutionality); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812, 815 (8th Cir. 1993) ("courts are obligated to interpret statutes in such a way as to avoid constitutional infinities," citing *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988)).[16] Here, if § 1926(b) is interpreted to

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[16] In *TCI*, the Eighth Circuit Court of Appeals also wrote, As the Supreme Court has stated:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.

DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397-98, 99 L.Ed.2d 645 (1988) (internal citations omitted). If we were to adopt TCI's broad definition of "dedicated," serious questions would arise as to whether [the statute in question] violated the Takings Clause of the federal

allow an indebted association to invoke the protections of that statute even when the association is providing service in a manner illegal under state law, then the statute could run afoul of both the Takings Clause of the Constitution and the reserved power of the states under the Tenth Amendment to exercise sovereign authority over their territory.[17] *See TCI of North Dakota, Inc.*, 11 F.3d at 815 (construing a statute in such a way as to avoid a Takings Clause question, where a constitutionally sound interpretation was an acceptable construction of the statute). Third, this court can find no case in which any court of appeals has rejected a state-law definition of an association's service area, as opposed to a municipality's encroachment under color of state law, which courts do not tolerate. *See, e.g., Glenpool Utility Serv.*, 861 F.2d at 1216 (rejecting state law as justifying an encroachment upon territory protected by superior federal law in the form of § 1926(b), but noting that the preemptive effect of the federal statute is not permanent, but contingent upon the district's outstanding federal debt). Rather, courts have routinely looked to state law as defining an association's protected service area under § 1926(b). *See, e.g., Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235 (looking to Kentucky law, which imposes various obligations on rural water districts, including a requirement that the

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> constitution. . . . Because the legal definition of "dedicated" is an "acceptable construction of the statute," we avoid any such potential "constitutional concerns."

TCI of North Dakota, Inc., 11 F.3d at 815.

[17] Indeed, these are the Tenth Amendment challenges to RWS # 1's interpretation of § 1926(b) that the City asserts here.

district obtain a certificate of convenience and necessity, to determine where the district has "made service available"); *North Alamo Water Supply Corp.*, 90 F.3d at 916 (identifying similar requirements of Texas law as sufficient to establish where an indebted association has "made service available").

In summary, while this court agrees with the Fifth Circuit Court of Appeals that a legal right and duty to serve is sufficient to fulfill the requirements of § 1926(b) that an indebted association have made service available, *North Alamo Water Supply Corp.*, 90 F.3d at 916, this court holds that the physical ability to serve an area is *not* sufficient to satisfy the statutory requirement that the association have "made service available" where there is a *legal* impediment to providing such service. Similarly, the court holds that providing actual service does not extend the protections of § 1926(b) to an indebted association's service of disputed territory in which the association has no legal right to provide service.

iii. Preemption of state-law determinations of service area. This conclusion is not undermined by principles of federal preemption of state law. "Statutory" preemption is the child of congressional authority, found in the Supremacy Clause of the U.S. Constitution, and congressional action, embodied in enactment of a statute. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, ___ U.S. ___, ___, 115 S. Ct. 1671, 1676 (1995) (the Supreme Court's "past cases have recognized that the Supremacy Clause, U.S. Const., Art. VI, may entail preemption of state law" by a law enacted by Congress). The Eighth Circuit Court of Appeals has

observed that "[p]reemption traditionally comes in four 'flavors' ":

> (1) "express preemption," resulting from an express Congressional directive ousting state law (*Morales v. Trans World Airlines, Inc.*, [504] U.S. [374], 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); (2) "implied preemption," resulting from an inference that Congress intended to oust state law in order to achieve its objective (*Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); (3) "conflict preemption," resulting from the operation of the Supremacy Clause when federal and state law actually conflict, even when Congress says nothing about it (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248 (1963); and (4) "field preemption," resulting from a determination that Congress intended to remove an entire area from state regulatory authority (*Fidelity Fed. Savs. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04, 103 S.Ct. 1713, 1721-22, 75 L.Ed.2d 752 (1983); *see generally, Burt Neuborn, An Overview of Preemption* (Fed.Jud.Ctr., Feb. 9, 1993).

Kinley Corp. v. Iowa Utilities Bd., 999 F.2d 354, 358 n.3 (8th Cir. 1993); *accord New York State Conference of Blue Cross*, ___ U.S. at ___, 115 S.Ct. at 1676 (preemption of state law occurs "either by express provision, by implication, or by a conflict between federal and state law").

Thus, federal law preempts state law not only where the two are plainly contradictory, but also where " 'the

incompatibility between [them] is discernible only through inference.' " *Hankins v. Finnel*, 964 F.2d 853, 861 (8th Cir. 1992) (quoting *Hayfield Northern R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 627 (1984)), *cert. denied sub nom. Missouri v. Hankins*, 506 U.S. 1013 (1992). To put it another way, "[p]reemption . . . will arise when 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988), in turn citing *Hines*, 312 U.S. at 67); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (preemption occurs when "it is impossible to comply with both state and federal law," or "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."); *Kinley*, 999 F.2d at 357 (the Supremacy Clause " 'invalidates state laws that "interfere with, or are contrary to," federal law,' " quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985)).

There are a number of reasons state law defining the service area of an indebted association is not preempted by § 1926(b). First, as explained above, no federal statute or regulation defines "made service available" within the meaning of § 1926(b). *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235 ("neither the statute nor the regulations specifically defines the terms 'provided' or 'made available.' "). Therefore, there is no federal law to have preemptive effect on any state law defining an indebted association's service area.

Second, the court is not saying that state law can be used to justify a municipality's encroachment upon disputed area in which an indebted association is legally

providing service under state law. The state law used to justify the encroachment would clearly conflict with or stand as an obstacle to, the non-encroachment provisions of § 1926(b), and consequently would be preempted by superior federal law in the form of § 1926(b). *See, e.g., Kinley Corp.*, 999 F.2d at 358 n.3; *Hankins*, 964 F.2d at 861. Therefore, there is express and conflict preemption of any state law that purports to take away from an indebted association any territory in which the association has both a legal and physical ability to provide service at the time the association is first entitled to invoke the protection of § 1926(b).

However, the scope of this preemptive effect of the federal statute on state law permitting encroachment upon a service area is specifically limited to periods when the association is indebted to the United States. *Scioto Water*, 103 F.3d at 42; *Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235; *CSL Utils., Inc.*, 16 F.3d at 133. Section § 1926(b) thus creates only a "window" of federal preemption of any state law permitting encroachment of a municipality on the existing service area of an association; that window opens when the association becomes indebted to the United States, and closes when the association ceases to be indebted to the United States or a third party standing precisely in the shoes of the United States by virtue of a purchase of notes under § 1929a *note*, subsections (a)-(e).

What the court is saying is that there is no express preemption of state law that *defines* the service area of an association at the moment the association becomes indebted to the United States, and is thereby entitled to the protection of § 1926(b). Section § 1926(b) expressly

prohibits only *curtailment* or *limitation* of the existing service area of the association by some *action* of a municipality (presumably under color of state law) to include the association's existing service area within the municipality's boundaries. 7 U.S.C. § 1926(b). It does not expressly prohibit a state-law definition of the existing service area of an association at the moment the association can invoke the protections of § 1926(b) by becoming indebted to the United States. Nor is there conflict preemption, because the federal statute certainly does not prohibit a definition of the service area of an association by state law prior to the association becoming indebted. Rather, state law that defines the service area of an association prior to or at the time it becomes indebted is state law that stands *outside* the window of § 1926(b) preemption and also is state law that can reasonably coexist with the federal law.

RWS # 1 seems to assert that preemption of any state law definition of service area as of the moment the association is entitled to invoke § 1926(b) protection arises from a conflict between a state-law definition of service area and the pipe-in-the-ground test. RWS # 1 would have it that having pipes in the ground is the sole test of "made service available." RWS # 1's reading would allow an association to turn back the clock to assert a service area anywhere the association had *ever* laid pipes, without regard to operation of state law during a period outside the limited window of § 1926(b) preemption, which courts have construed to be *only* the period when an association is indebted. As construed by this and other courts, however, the state-law and pipe-in-the-ground tests are not independent tests, but prongs of a single test

for "made service available." *See Lexington-South Elkhorn Water Dist.*, 93 F.3d at 235-37. The court finds no conflict, because the court simply cannot read § 1926(b) to revivify, via the pipe-in the-ground test, an association's right to serve in an area lost by operation of state law during a period when the association was not indebted to the FmHA. This is so, because the federal statute expressly prohibits, and thus preempts, only actions by a municipality to annex the service area of an association after that association becomes indebted to the United States.

iv. Interplay of state and federal law. Thus, the court concludes that the protected service area of an indebted association is defined by looking to state and federal law. To put the matter in concrete terms applicable to the facts of this case, if an indebted association ceases to be indebted to the FmHA, or a third party who stands precisely in the shoes of the FmHA by virtue of buying notes of an association under § 1929a note, subsections (a)-(e), as a matter of federal law, the association loses its protection under § 1926(b). State law, and only state law, then defines a municipality's right to annex portions of the association's service area, just as state law, and only state law, otherwise defines where it is the association can legally initiate or continue to provide service. If the association again becomes indebted to the FmHA, its protected service area is defined by state law as of the date of the renewed indebtedness. The association's protected service area would consist of territory in which it had the legal right to serve, as defined by state law, as well as the territory in which it had the legal right to serve *and* the physical ability to serve. However, the association could not claim the protection of § 1926(b) in

territory properly annexed by the municipality, even if the association still had pipes remaining in the ground, because in such an area, the association would not have the legal right to provide service, standing alone, nor would the association have the physical ability to serve *and* the legal right to serve. Nothing about § 1926(b) permits the association to "look back" to claim all of the territory in which it had a physical ability to serve or once provided such service and to claim § 1926(b) protection solely on the basis of that physical ability to serve. To repeat, § 1926(b) cannot be read to revivify an association's right to serve in an area lost by operation of state law during a period when the association was not indebted to the FmHA.

c. Where did RWS # 1 make service available?

The court found above that the answer to the question of where RWS # 1 "made service available" is determined by the interplay, or coincidence, of the "legal authority" to serve and the "pipe-in-the-ground" test of physical ability to serve. The court therefore begins this portion of its inquiry with an examination of where RWS # 1 had the legal authority to provide water service as of July 1, 1992, the date RWS # 1 again became indebted to the United States and therefore was again able to assert the protection of § 1926(b). Furthermore, as the court stated above, the answer to the question of where RWS # 1 had a legal right to serve depends entirely upon applicable *state* law.

*i. **Legal authority to serve.*** Except for its assertion that the City's expansion to its 1989 city limits encroached upon protected service area, an assertion dispensed with by this court's conclusion that RWS # 1 had no protection under § 1926(b) at the time of that annexation, RWS # 1 does not contend that the City's annexation in 1989 violated either state or federal law. The question is really what territory beyond the City's 1989 city limits the City gained the exclusive right to serve upon expansion to its 1989 city limits.

The City relies upon Iowa Code § 357A.2 as establishing its exclusive right to serve customers within two miles of its 1989 city limits, and contends further that RWS # 1 has never complied with statutory requirements to seek permission from the City to serve customers within the two-mile zone by submitting a notice of intent and a plan to the City. The City argues that this statute expressly applies to RWS # 1, because it expressly applies to an association incorporated under Iowa Code Ch. 504A. Thus, the City argues, under the statute, RWS # 1 could not provide water services within two miles of the limits of the city. Iowa Code § 357A.2 (a covered entity "shall not" provide water services within the two-mile zone).

RWS # 1 contends that, as a rural water *association* organized under Iowa Code Ch. 504A, not a "rural water *district*" organized under Iowa Code Ch. 504A, the provisions of Iowa Code Ch. 357A upon which the City relies do not apply. It also contends that, even if it is subject to the two-mile zone created by Iowa Code § 357A.2, pursuant to that statute, annexation by the City cannot oust it

from its "franchise" as defined by pipes in the ground on April 1, 1987.

Unfortunately, neither the court nor the parties have found any decisions of any Iowa state court interpreting Iowa Code § 357A.2. However, it is fortunate indeed that the differences between § 357A.2 as it existed in 1989 and as it existed after amendments in 1992 are not outcome determinative of issues here, because the parties have not adequately traced the language of Iowa Code § 357A.2 as it existed at all times relevant in this litigation, quoting to the court only the version of the statute as amended in 1992.

In 1987, the Iowa legislature amended Iowa Code § 357A.2 to add the part of the statute pertinent here, the part establishing what this court will call the "two-mile rule." Acts 1987 (72 G.A.) ch. 109, § 2. The pertinent portion of the statute then read as follows:

> Water services, other than water services provided as of April 1, 1987, shall not be provided within two miles of the limits of a city by a rural water district incorporated under this chapter or chapter 504A unless the city has approved a new water service plan submitted by the district. If the new water service plan is not approved by the city, the plan may be subject to arbitration.

Iowa Code § 357A.2. This is the version of the statute that was effective at the time the City expanded to its 1989 city limits.[18]

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[18] The parties have cited to the court only the version of § 357A.2 as later amended in 1992. Acts 1992 (74 G.A.) ch. 1015,

In *Olympus Aluminum Prods., Inc. v. Kehm Enters., Ltd.*, 930 F. Supp. 1295 (N.D. Iowa 1996), this court reviewed

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§§ 3, 4. That version of the statute provides in comparable part as follows:

> Water services, other than water services provided as of April 1, 1987, shall not be provided within two miles of the limits of a city by a rural water district incorporated under this chapter or chapter 504A except as provided in this section.
>
> A rural water district incorporated under this chapter or chapter 504A may give notice of intent to provide water service to a new area within two miles of a city by submitting a water plan to the city. The plan is only required to indicate the area within two miles of the city which the rural water district intends to serve. If the city fails to respond to the rural water district's plan within ninety days of receipt of the plan, the rural water district may provide service in the area designated in the plan. The city may inform the rural water district within ninety days of receipt of the plan that the city requires additional time or information to study the question of providing water service outside the limits of the city. If additional time or information is required, the city shall respond to the rural water district's plan within one hundred eighty days of receipt of the plan. In responding to the plan, the city may waive its right to provide water service within the areas designated for service by the rural water district, or the city may reserve the right to provide water service in some or all of the areas which the rural water district intends to serve. If the city reserves the right to provide water service within some or all of the areas which the rural water district intends to serve, the city shall provide service within four years of receipt of the plan. This section does not preclude a city from providing water service in an area which is annexed by the city.

extensively the rules of statutory interpretation applied by the Iowa Supreme Court. Suffice it to say here that the touchstone of statutory interpretation under Iowa law, as under federal law, is legislative intent. *City of West Branch v. Miller*, 546 N.W.2d 598, 602 (Iowa 1996) ("In interpreting statutes, our ultimate goal is to determine legislative intent," citing *Peffers v. City of Des Moines*, 299 N.W.2d 675, 678 (Iowa 1980)). When the language of a statute is plain and its meaning is clear, Iowa courts "should not reach for meaning beyond [the statute's] express terms. . . . Nor should we resort to statutory rules of construction to determine legislative intent." *Id.* (internal citation omitted). Where reasonable minds differ as to the meaning of a statute,

> [o]ne . . . rule [of construction] provides that we are bound by what the legislature said, rather than what it should or might have said. *State v. Jones*, 464 N.W.2d 241, 242 (Iowa 1990); Iowa R. App. P. 14(f)(13). We may not, under the guise of statutory construction, enlarge or otherwise change the terms of a statute. *Jones*, 464 N.W.2d at 242. Finally, "[w]e may consider the language

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Iowa Code § 357A.7 (1991; Supp. 1992). The main difference between this version of Iowa Code § 357A.2 and the earlier version is that the requirements for notice by a rural water district and the effect of a municipality's response were changed. Under the former version of § 357A.2, a municipality had to approve a rural water district's service plan before the rural water district could serve customers identified in the plan. Iowa Code § 357A.2 (1987). However, under the later version, Iowa Code § 357A.2 (1991; Supp.1992), if a municipality did not respond to a rural water district's service plan, the rural water district was authorized to provide service in the area designated in the plan. *Id.*

> used in the statute, the objects sought to be accomplished, the evils and mischiefs sought to be remedied and place a reasonable construction on the statute which will best effect its purpose rather than one which will defeat it." *Peffers*, 299 N.W.2d at 678.

Miller, 546 N.W.2d at 602. Legislative intent is " 'expressed by omission as well as by inclusion.' " *Wiebenga v. Iowa Dept. of Transp.*, 530 N.W.2d 732, 735 (Iowa 1995) (quoting *Barnes v. Iowa Dept. of Transp.*, 385 N.W.2d 260, 263 (Iowa 1986)). Thus, if the legislature had intended a statute to include a prohibition on certain conduct, the Iowa Supreme Court believes the legislature would have specifically mentioned that conduct, but where it did not, the statutory provision is deemed not to apply to that conduct. *Id.* Similarly, if the legislature had intended one statutory provision to apply without regard to another statutory provision already in force, it would have said so. *See Federal Land Bank of Omaha v. Bryant*, 445 N.W.2d 761, 762 (Iowa 1989); *Federal Land Bank of Omaha v. Sleister*, 444 N.W.2d 504, 506 (Iowa 1989). Finally, "[w]hen statutes relate to the same subject matter or to closely allied subjects they are said to be in pari materia and must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation." *Farmers Co-op. Co. v. DeCoster*, 528 N.W.2d 536, 538 (Iowa 1995).

Applying these rules of construction, the court finds that Iowa Code § 357A.2, as it existed in 1987, and as it remained after amendments in 1992, does *not* apply the two-mile rule to every sort of association providing water services. Rather, § 357A.2 establishes the two-mile rule as

applicable only to "a rural water district incorporated under this chapter or chapter 504A." Iowa Code § 357A.2. The City glosses over this language, assuming that it applies to RWS # 1, because RWS # 1 was incorporated under Iowa Code Ch. 504A, without observing any difference between a rural water association, such as RWS # 1, and "a rural water district." RWS # 1 contends, however, that "rural water districts" are peculiar kinds of creatures created by either of two statutes, and further, that RWS # 1 is not either kind of creature.

Iowa Code Ch. 357 authorizes creation of "benefited water districts" by a county board of supervisors. Iowa Code § 357.1. Iowa Code § 357.1 incorporates a two-mile rule applicable to such "benefited water districts" in terms almost identical to those found in Iowa Code § 357A.2. Iowa Code Ch. 357A, on the other hand, authorizes the creation of a water district by petition of area property owners to a county board of supervisors. Iowa Code § 357A.2. The court will describe this second kind of water district as a "special water district." Iowa Code Ch. 357A further permits, but does not require, "nonprofit corporations incorporated under [Iowa Code] chapter 504A for the specific purpose of operating a rural water system" to petition a county board of supervisors "for incorporation of a [special water] district, in the manner provided by section 357A.2." Iowa Code § 357A.20 (nonprofit corporation "*may* petition" for reincorporation as a water district under Iowa Code Ch. 357A).

Giving Iowa Code § 357A.2 its plain meaning, *Miller*, 546 N.W.2d at 602, and reading Iowa Code §§ 357A.2 and 357A.20 *in pari materia*, *DeCoster*, 528 N.W.2d at 538, it is

apparent that Iowa Code § 357A.2 does not make applicable its two-mile rule to every nonprofit water service corporation incorporated under Iowa Code Ch. 504A, but only to Chapter 504A corporations that have *reincorporated* as water *districts* under Iowa Code § 357A.20. First, this is what the statute in question actually says. Iowa Code § 357A.2 ("Water services . . . shall not be provided within two miles of the limits of a city *by a rural water district incorporated under this chapter or chapter 504A*"). Only a rural water corporation originally incorporated under Chapter 504A that has reincorporated under § 357A.20 is a "rural water *district*" incorporated under Chapter 504A. Pursuant to the terms of Iowa Code § 357A.20, such a reincorporated district ceases to exist as a Chapter 504A entity, Iowa Code § 357A.20(2), although it does continue to operate under its Chapter 504A directors, officers, articles of incorporation, and bylaws until its first annual meeting. Iowa Code § 357A.20(3), (4), and (5). Thus, the plain meaning of the reference to a water *district* incorporated under Chapter 504A in § 357A.2 is to a nonprofit water service corporation that originally incorporated under Chapter 504A, but then reincorporated as a "district" under § 357A.20.

Second, although the establishment of the two-mile rule applicable to "benefited water districts" under § 357.1 and a similar rule applicable to "special water districts" under § 357A.2 may suggest that the Iowa legislature intended to provide municipalities with a two-mile exclusivity zone against *all* non-municipal water service entities, that is not what the Iowa legislature actually said. Had the legislature intended to bar water services by *every* other entity within two miles of a

municipality, this court may fairly conclude that the legislature would have said so. *Wiebenga*, 530 N.W.2d at 735. Furthermore, this court is "bound by what the legislature said, rather than what it should or might have said," and the court "may not, under the guise of statutory construction, enlarge or otherwise change the terms of a statute." *Miller*, 546 N.W.2d at 602. So far as the parties have shown the court and so far as the court has found from its own research, the, Iowa legislature has not created a general "two-mile rule" providing municipalities with a zone of exclusivity for water services against all comers.

Therefore, Iowa Code § 357A.2 does not define or limit RWS # 1's service area to an area more than two miles outside of the City's 1989 city limits.[19] The City has not asserted that there is any other legal limitation on RWS # 1's right or authority to serve customers in the disputed area. Therefore, in this case, RWS # 1's protected service area does depend entirely upon the second prong of the test, RWS # 1's physical ability to serve customers in the disputed territory.

*ii. **Physical ability to serve.*** Turning to the "pipe-in-the-ground test," the court finds genuine issues of material fact preclude summary judgment in favor of either party on the question of encroachment upon RWS # 1's protected service area. After reviewing the decisions in *Jennings Water*, *Glenpool Util. Servs. Auth.*, and *Bear*

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[19] By the same token, the City cannot mount a Tenth Amendment challenge to § 1926(b) as impinging on the reserved rights of the state by taking from the City its exclusive rights to provide water service in the two-mile zone. The City simply never had such a right by operation of *state* law.

Creek, the Sixth Circuit Court of Appeals in *Lexington-South Elkhorn Water Dist.* explained the test of physical ability to serve as follows:

> These cases teach that whether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.

Lexington-South Elkhorn Water Supply Dist., 93 F.3d at 237. Although the record includes maps of where RWS # 1's and the City's respective water lines run, the information provided by the maps and other exhibits, the court finds, does not remove all doubts about where RWS # 1 was physically able to provide service as of July 1, 1992, when RWS # 1 again became indebted to the United States.

The principal problem is a dispute between the parties over the purpose of one line, built in 1988, which runs through Sioux Center proper and connects parts of RWS # 1's network on each side of the City. The City contends that there was an agreement that the line was a dedicated "transmission" line, not a service line, and thus it cannot be used as part of the "pipe-in-the-ground test" to determine whether RWS # 1 was making service available to customers adjacent to that line. RWS # 1 and *amicus* urge the court to recognize that a dichotomy between "transmission" and "service" lines is unrealistic in a rural setting, because long lines must be run to

widely separated properties, and any such line might be tapped to provide a "service" connection to a property anywhere along the line.

Although the court is convinced that, ordinarily, it would be artificial at best to maintain a distinction between "service" and "transmission" water lines in a rural setting, the City has generated a genuine issue of material fact as to whether the specific line in question was a dedicated "transmission" line as a matter of agreement between the parties. The court would be inclined to recognize a promise limiting water facilities to a specific kind of use, and would be unsympathetic to arguments that such an agreement should be ignored when it suits a party's interests to renounce the agreement. However, the court cannot yet make any determinations on the purpose of the line. The City has produced documents, admittedly all generated by persons on its side of the question, supportive of the City's belief that the line in question would be a dedicated "transmission" line, not a service line. What the record does not reveal is what RWS # 1's understanding of any agreement was at the time the line was built. However, the documentation the City has produced as evidence of an agreement concerning the limitation on use of the line in question is sufficient to fulfill the City's' burden, as the non-movant for summary judgment, to go beyond the pleadings, and designate "specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P.* 56(e); *Celotex*, 477 U.S. at 324; *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995); *Beyerbach*, 49 F.3d at 1325. Therefore, genuine issues of material fact surround whether each of the pipes in the ground can be considered in applying the "pipe-in-the

ground test." Those genuine issues of material fact preclude summary judgment on the ultimate question of whether the City has encroached on RWS # 1's service area in violation of § 1926(b).

Having identified these genuine issues of material fact, the court does not deem it necessary to recount here other portions of the disputed area that are subject to other genuine issues of material fact as to RWS # 1's physical ability to provide service and the City's encroachment on such service area. However, the court is also satisfied that the City has generated genuine issues of material fact as to RWS # 1's actual physical ability to serve all of the territory it claims is now protected by § 1926(b). Suffice it to say that this matter will proceed to trial on the question of the extent of RWS # 1's protected service area, outside of the City's 1989 city limits, and whether encroachments by the City on that protected service area have actually occurred or been threatened.

V. CONCLUSION

The court concludes first that RWS # 1 has asserted two different claims for violation of § 1926(b). One such claim is brought via 42 U.S.C. § 1983, and the other via the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Neither of these claims is time-barred, the § 1983 action because the court finds a "continuing violation" has been pleaded and adequately supported by the record for summary judgment purposes, and the declaratory judgment claim because there is a substantial controversy between the parties that is appropriate for determination at this time.

Turning to the merits of RWS # 1's claims on the cross-motions for summary judgment, the court concludes that provisions of the 1987 ACA, found at 7 U.S.C. § 1929a *note*, did not extend the protections of § 1926(b) to an association such as RWS # 1 that extinguished its debt to the United States during the buy-out program authorized by the 1986 OBRA. First, the plain meaning of subsection (f) of § 1929a *note* is that the offer to the issuer is a *prerequisite* to a "sale . . . under this section," meaning a sale authorized and conducted as stated in subsections (a)-(e) of § 1929a *note*; a sale under subsection (f), however, *is not* a "sale . . . under this section," because it is not a sale under subsections (a)-(e).

The court next concludes that subsection (g) of § 1929a *note*, which extends § 1926(b) protection to notes "sold or intended to be sold under this section," does not extend § 1926(b) protection to notes sold to the issuer under subsection (f). Notes sold to the issuer under subsection (f) are neither notes "sold . . . under this section," meaning pursuant to subsections (a)-(e), because they have instead been sold under subsection (f), nor are they notes "intended to be sold under this section," because they have already been sold under subsection (f). The context of subsection (g) confirms this interpretation, because of the significant differences between a sale under subsections (a)-(e), which does not change the terms of the note, and a sale under subsection (f), which allows a buy out of the note on favorable terms and extinguishment of the debt. This interpretation of subsection (g) is also in keeping with the policy of the underlying statute, § 1926(b), to protect not only an indebted association, but the United States as a creditor. Extending

that protection only to a party who stands precisely in the shoes of the United States, by purchasing a note from the United States, is more in keeping with the purpose of § 1926(b) than is extending that protection to a party no longer indebted to the United States or a third party on the same obligation. Finally, the legislative history provides nothing plainly contrary to this court's reading nor plainly supportive of a reading of subsection (g) as extending § 1926(b) protection to an issuer no longer indebted to anyone on the obligation formerly held by the United States. Rather, the legislative history makes clear that the sponsor of the amendment that became subsection (g) intended it to clarify the continued applicability of § 1926(b) to a sale of notes to a third party, not to a sale of notes to the issuer.

As a consequence of these conclusions concerning the interpretation of the applicable federal statutes, the court concludes that RWS # 1 lost the protections of § 1926(b) when it bought back its notes in 1988 and did not regain any protection of § 1926(b) until RWS # 1 again became indebted to the United States in 1992. RWS # 1 simply cannot state a claim that the City violated § 1926(b) when it annexed portions of the disputed territory in 1989, because RWS # 1 simply had no protection of § 1926(b) to assert against that annexation. Summary judgment in favor of the City is therefore **granted** on any part of any claim in which RWS # 1 asserts that the City's expansion to its 1989 city limits involved a curtailment or limitation of RWS # 1's service area in violation of § 1926(b), and that part of RWS # 1's cross-motion for summary judgment asserting that the City's expansion to its 1989 city limits violated § 1926(b) is **denied**.

The question of whether curtailments or threatened curtailments of RWS # 1's service area occurred in violation of § 1926(b) after July 1, 1992, when RWS # 1 again became indebted to the United States, cannot be resolved on summary judgment. The court concludes that RWS # 1's service area, where it "made service available," must be determined by the coincidence of RWS # 1's legal right or authority to serve, a matter of state law, and its physical ability to serve, a matter of fact determined by the "pipe-in-the-ground test." The court finds that the Iowa statute the City contended established RWS # 1 had no legal right to serve within two miles of the City's 1989 city limits is not applicable to an entity such as RWS # 1, which is not a "special water district," but has instead remained a water service association.

Therefore, the question of the extent of RWS # 1's protected service area turns on RWS # 1's physical ability to serve portions of its service area. Where RWS # 1 was physically able to serve is the subject of genuine issues of material fact. In particular, the court finds that the City has generated genuine issues of material fact as to whether RWS # 1 agreed that one of its lines would be only a dedicated transmission line, thus excluding that line from defining where RWS # 1 physically made service available. Other fact questions persist as to RWS # 1's physical ability to serve the entirety of the area outside of the City's 1989 boundaries that RWS # 1 claims is protected by § 1926(b).

Consequently, the cross-motions for summary judgment are **denied** to the extent not otherwise resolved above, and this matter will proceed to trial on the question of the extent, of RWS # 1's physical ability to serve

all portions of its asserted service area outside of the City's 1989 city limits and the City's encroachment upon any protected service area.

IT IS SO ORDERED.

DATED this 27th day of May, 1997.

/s/ Mark W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT
JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WESTERN DIVISION

RURAL WATER SYSTEM #1, an Iowa non-profit corporation, Plaintiff, vs. CITY OF SIOUX CENTER, IOWA, Defendant.	No. C 95-4112-MWB **ORDER REGARDING DEFENDANT'S MOTION FOR RECONSIDERATION** (Filed Jun. 23, 1997)

This matter comes before the court pursuant to the June 9, 1997, motion of the defendant City of Sioux Center for reconsideration of this court's May 27, 1997, Memorandum Opinion And Order Regarding Cross-Motions For Summary Judgment, alternative application for certification of questions to the Iowa Supreme Court, and request for oral arguments. Specifically, the City contends that the court has improperly construed Iowa statutes to conclude that the "two-mile rule" of Iowa Code § 357A.2 does not apply to a rural water system that is neither a "benefitted water district" nor a "special water district." Plaintiff RWS #1 resists the motion on procedural and substantive grounds and also resists oral arguments on the motion.

Assuming that the court has the authority to reconsider its prior order, either on the basis of its inherent

power, *see Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), or pursuant to *Fed. R. Civ. P.* 60(b), the court finds no grounds for altering its order of May 27, 1997, certifying questions to the Iowa Supreme Court, or granting further oral arguments. Simply put, the City has presented nothing demonstrating that the court has erroneously construed the applicable Iowa statutes. Because "there is no there there,"[1] the court concludes that oral arguments are not necessary.

The City contends that the court improperly read § 357A.2 *in pari materia* with § 357A.20, when the court should instead have read it *in pari materia* with § 357A.21. The City argues that the version of § 357A.20 in force at the time of events in question, 1987, did not provide for reincorporation of "[a] nonprofit corporation incorporated under chapter 504A for the specific purpose of operating a rural water system," Iowa Code § 357A.20 (1991), but for reincorporation of "[a] nonprofit corporation incorporated under the laws of the state of Iowa for the specific purpose of operating a rural water system." Iowa Code § 357A.20 (1987). This part of the City's motion is correct, so far as it goes. The City next points out that, in 1987, only § 357A.2 and § 357A.21 referred to water districts incorporated under Iowa Code Ch. 504A. The City therefore argues that, since § 357A.20, which provides for reincorporation of nonprofit corporations as special water districts, did not refer to chapter 504A corporations, the reference to chapter 504A corporations in § 357A.2 and § 357A.21 must have been to something

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[1] Gertrude Stein, EVERYBODY'S AUTOBIOGRAPHY 289 (1937).

other than chapter 504A corporations reincorporated under § 357A.20.

The City's arguments for its interpretation of the statutes in question, however, necessarily fail. The reference in § 357A.20, as it stood in 1987, to "[a] nonprofit corporation *incorporated under the laws of the state of Iowa* for the specific purpose of operating a rural water system" plainly *includes* any such nonprofit corporations incorporated under Iowa Code Ch. 504A. Furthermore, the City persists in reading a key term out of § 357A.2: that statutory provision, in 1987 as now, provided that water services could not be provided within two miles of a city's city limits, except under certain circumstances, by "a rural water *district* incorporated under this chapter or chapter 504A." Iowa Code § 357A.2 (1987) (emphasis added). Because RWS #1 never chose to reincorporate as a water "district" under § 357A.20, but remained a chapter 504A corporation, it simply remained outside the reach of the "two-mile rule" of § 357A.2.

The City's efforts, by reference to *federal* regulations and to legislative history that is at best ambiguous, to establish that § 357A.2 was intended to make the "two-mile rule" applicable to a water service entity that was not a water *district* are simply unpersuasive as contrary to the plain language of the statute. *City of West Branch v. Miller*, 546 N.W.2d 598, 602 (Iowa 1996) (when the language of a statute is plain and its meaning is clear, Iowa courts "should not reach for meaning beyond [the statute's] express terms.").

As the court explained in its prior ruling, a nonprofit corporation providing water services that is incorporated

under chapter 504A becomes a "district" only by exercising the option provided by § 357A.20, and reincorporating under that provision. A "district" may also be incorporated directly under § 357A.2. Because there are two different ways a water service entity can become a water *district* under chapter 357A, and because an entity reincorporated pursuant to § 357A.20 was originally incorporated pursuant to other provisions of the Code of Iowa and continues to be governed, at least for a time, pursuant to those other provisions, rather than pursuant to chapter 357A, *see* Iowa Code § 357A.20 (1989),[2] the reference to chapter 504A in § 357A.2 is not rendered "meaningless" by this court's interpretation, as the City contends.

Also, the City's renewed argument that it makes no sense for the statute to fail to protect municipalities against all comers cannot stand in the face of Iowa rules of interpretation. *See Miller,* 546 N.W.2d at 602 ("One . . . rule [of construction] provides that we are bound by what the legislature said, rather than what it should or might have said. *State v. Jones,* 464 N.W.2d 241, 242 (Iowa 1990); Iowa R. App. P. 14(f)(13)."). The court will not adopt the City's interpretation on the ground that the Iowa legislature should or could have said something different from what it actually said. *Id.*

Finally, the court rejects a motion to certify questions to the Iowa Supreme Court that comes only after an

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[2] The specifics of continued operation under the previous articles of incorporation and bylaws are now stated in subdivisions (3) and (4) of § 357A.20.

adverse interpretation of governing law has been rendered by this court. The court agrees that the practice of requesting certification after an adverse judgment has been entered should be discouraged. *Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 209 (8th Cir. 1987). The City is not entitled to a second bite at the apple via certification of questions after this court has rendered a decision on precisely the questions to which certification pertains. *See, e.g., Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (a party should not be allowed a "second chance of victory" after the district court has decided an issue).

Thus, the motion to reconsider, alternative motion to certify questions, and request for oral arguments are **denied** in their entirety.

IT IS SO ORDERED.

DATED this 23rd day of June, 1997.

/s/ Mark W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT
JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WESTERN DIVISION

RURAL WATER SYSTEM #1, an Iowa non-profit corporation, Plaintiff, vs. CITY OF SIOUX CENTER, IOWA, Defendant.	No. C 95-4112-MWB **MEMORANDUM OPINION AND JUDGMENT REGARDING TRIAL ON THE MERITS** (Filed Nov. 12, 1998)

Trial on the merits is the second major battle in this "turf war" between a non-profit corporation and a municipality over which entity is entitled to distribute water in a disputed territory surrounding the municipality. In the first major battle, on the parties' cross-motions for summary judgment, the court clarified – or thought it clarified – precisely what territory is still in dispute and what issues remained to be tried. *See Rural Water Sys. #1 v. City of Sioux Center, Iowa*, 967 F. Supp. 1483 (N.D. Iowa 1997). After pre-trial briefing, a bench trial that lasted several days and involved the presentation of voluminous exhibits – such as maps detailing the location, size, flows, and pressures of pipelines and the location of disputed customers – post-trial briefing, and closing arguments, the court can safely say that, although perhaps no wiser, it is considerably better informed. The court must now try to end this turf war by apportioning territory and ordering reparations, if appropriate.

I. INTRODUCTION

Plaintiff Rural Water System #1 (RWS #1), a non-profit corporation, filed the original complaint in this lawsuit on November 2, 1995, and an amended complaint on October 22, 1996, against defendant City of Sioux Center, Iowa (the City), alleging generally violations of 7 U.S.C. § 1926(b), which protects rural water associations indebted to the United States from encroachment on their service areas by adjacent municipalities. In addition, RWS #1 asserts three state-law claims: tortious interference with prospective business advantage, conversion of property, and inverse condemnation. All of RWS #1's claims allegedly arise from the City's annexation of portions of RWS #1's asserted service area, the City's demands that it, not RWS #1, supply the water needs of customers in the annexed areas and within two miles of the City's new boundaries, and the City's actual service to some of the customers in the disputed area, which RWS #1 alleges resulted in "curtailment" or "limitation" of RWS #1's federally-protected service area. As relief, RWS #1 requests preliminary and permanent injunctions prohibiting the City's curtailment of RWS #1's service area in violation of 7 U.S.C. § 1926(b); declaratory judgment concerning the rights of the parties to serve the disputed area and alleged violations of state and federal law; equitable relief; damages, both compensatory and punitive; and attorney's fees and costs. The issues for trial were clarified by the court's ruling on cross-motions for summary judgment on May 27, 1997.

This matter proceeded to trial beginning on May 11, 1998, and concluding on May 14, 1998. Closing arguments, however, were not held until October 29, 1998. At

closing arguments, as at trial, plaintiff RWS #1 was represented by lead counsel Louis T. Rosenberg of Louis T. Rosenberg, P.C., in San Antonio, Texas, who argued the case on behalf of RWS #1, and local counsel Randall G. Sease of the Sease Law Firm in Hartley, Iowa. Defendant City of Sioux Center, Iowa, was represented by counsel Ivan T. Webber of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., in Des Moines, Iowa.

A. The Summary Judgment Ruling

Because the court's ruling on the parties' cross-motions for summary judgment, *Rural Water Sys. #1 v. City of Sioux Center, Iowa*, 967 F. Supp. 1483 (N.D. Iowa 1997), framed the factual and legal issues for trial, the court will recapitulate the conclusions in that ruling here. In the summary judgment ruling, the court considered, *inter alia*, the requirement that the entity seeking protection under § 1926(b) be indebted to the United States at the time of the alleged curtailment of its protected service area.[1] After examining the record concerning RWS #1's

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[1] The statutory provision upon which RWS #1's federal claim is based provides as follows:

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area *during the term of such loan;* nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to

"buy out" of its notes to the United States,[2] and interpretation of the pertinent statutory provisions governing that "buy out,"[3] the court concluded that RWS #1 lost the protections of § 1926(b) when it bought back its notes in 1988 and did not regain such protections until RWS #1 again became indebted to the United States in 1992. Consequently, the court concluded that RWS #1 could not state a claim that the City violated § 1926(b) when it annexed portions of the disputed territory in 1989, because RWS #1 simply had no protection of § 1926(b) to assert against that annexation. The court therefore granted summary judgment in favor of the City on any part of any claim in which RWS #1 asserted that the City's expansion to its 1989 city limits involved a curtailment or limitation of RWS #1's service area in violation of § 1926(b), and denied that part of RWS #1's cross-motion for summary judgment asserting that the City's expansion to its 1989 city limits violated § 1926(b).

The question of whether curtailments or threatened curtailments of RWS #1's service area occurred in violation of § 1926(b) after July 1, 1992, when RWS #1 again

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serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b) (emphasis added).

[2] RWS #1's pay-off of its federal loans in 1988 was pursuant to the Omnibus Budget Reconciliation Act (OBRA) of 1986 and the Agricultural Credit Act of 1987(ACA), which amended the 1986 OBRA by providing for a "Buy Out Program" of FmHA loans.

[3] The pertinent provisions are subsections (f) and (g) of 7 U.S.C. § 1929a *note*.

became indebted to the United States, the court concluded, would have to await resolution upon trial on the merits. The court concluded that RWS #1's service area, where it "made service available," must be determined by the coincidence of RWS #1's legal right or authority to serve, a matter of state law, and its physical ability to serve, a matter of fact determined by the "pipe-in-the-ground test" established by federal precedent. The court found that the Iowa statute the City contended established RWS #1 had no legal right to serve within two miles of the City's 1989 city limits, IOWA CODE § 357A.2, is not applicable to an entity such as RWS #1, which is not a "special water district," but has instead remained a water service association.

Therefore, the court concluded, the question of the extent of RWS #1's protected service area turns on RWS #1's physical ability to serve portions of its service area. Where RWS #1 was physically able to serve, however, was the subject of genuine issues of material fact. In particular, the court found that the City had generated genuine issues of material fact as to whether RWS #1 had an agreement with the City that one of its lines would be only a dedicated transmission line, thus excluding that line from defining where RWS #1 physically made service available. Other fact questions persisted as to RWS #1's physical ability to serve the entirety of the area outside of the City's 1989 boundaries that RWS #1 claims is protected by § 1926(b).

Consequently, the court denied the cross-motions for summary judgment to the extent not otherwise resolved, and stated that this matter would proceed to trial on the question of the extent of RWS #1's physical ability to

serve all portions of its asserted service area *outside* of the City's 1989 city limits and the City's encroachment upon any protected service area. The findings of fact, which follow, are molded to address the remaining questions identified in the summary judgment ruling.

B. Findings Of Fact

These findings of fact are not meant to be exhaustive. They are intended instead to provide the necessary context for the legal analysis that follows. Further findings of fact, where necessary, appear in that legal analysis. These findings of fact begin with the parties' stipulation of facts in the final pretrial order.

1. Stipulated facts

RWS #1, a non-profit corporation created pursuant to Iowa Code Ch. 504A on May 6, 1969, operates as a retail water service corporation. RWS #1 began providing or making services available in 1972 to a general area approximately eighteen miles by thirty-six miles, and including thirteen townships, in Sioux County, Iowa, and six townships in O'Brien County, Iowa. RWS #1 completed installation of its pipes in its first rural area (Phase III area) in 1975 and 1976. Although RWS #1's building projects were financed by the Farm Home Administration (FmHA), RWS #1 was not indebted to FmHA from September 22, 1988 – after participating in a buy out authorized by the Omnibus Budget Reconciliation Act (OBRA) of 1986 and the Agricultural Credit Act of 1987(ACA) – until July 1, 1992. However, on July 1, 1992, and again in

1995, RWS #1 became reindebted to the FmHA for a total of $2,030,000. In 1992, the City was aware that RWS #1 was requesting a $1.7 million loan from the FmHA to fund improvements to RWS #1's Water Treatment Plant No. 2, which is just outside and to the west of Sioux Center. The parties do not dispute that RWS #1 is "an association" within the meaning of § 1926(b), and that as of July 1, 1992, RWS #1 had a qualifying outstanding obligation to the FmHA.

The City of Sioux Center is a municipal corporation organized under Iowa law and located in Sioux County, Iowa. It also operates a water supply system, as a municipal utility, and supplies customers inside its city limits. The City has from time to time contracted with RWS #1 for water treatment and the parties have been involved in other joint uses of facilities. Specifically, the City has paid RWS #1 to treat City well water to bring it to a certain grade or quality pursuant to a 5-year agreement entered into in 1992.

On December 22, 1989, the City annexed 1,620 acres outside of its 1975 city limits. These 1,620 acres of land included territory in which RWS #1 had previously supplied water or had laid pipes and built other facilities. RWS #1 had certain installations and facilities in place between the City's pre-existing 1975 boundary and its 1989 boundary, some of which existed around the peripheral areas of what became the 1989 boundary. RWS #1 continues to supply water to some customers now inside the City's 1989 city limits. On October 1, 1990, the City also voluntarily annexed 2.88 acres of land adjacent to its 1989 boundaries. In December of 1995, the City annexed another twenty acres, known as "the Byl Subdivision," by

voluntary annexation. Next, in March of 1996, the City annexed an additional 0.41 acres north of its 1990 annexation by voluntary annexation. Between the City's 1989 boundary and its present boundary, RWS #1 has an investment and facilities in place.

RWS #1 has at times advised the City of requests for connection to the rural water system from customers within two miles of the City's 1989 city limits and has asked the City to advise RWS #1 whether the City or RWS #1 should supply the customer. In June of 1994, the City installed a water line mainly along Harrison Avenue/13th Avenue Southeast, which street is the eastern city limit of Sioux Center. The installation of this water line was performed by contractor Jim Mouw, doing business as Jim's Digging Service. In 1996, Mr. Mark Donnell, a resident of the Byl Subdivision, paid Mr. Mouw to install a water line that crossed RWS #1's line, crossed over to the west side of Harrison Avenue, and connected with the City's newly-constructed 8-inch waterline, which runs parallel to RWS #1's line, installed in 1975, and already in place in Mr. Donnell's front lot.

2. *Further findings of fact*

a. The RWS #1 system

In addition to the above facts, to which the parties have stipulated, the court finds the following facts have been proved from the evidence presented at trial. The following map, a miniaturization of Plaintiff's Trial Exhibit 114A, may be of assistance to understanding various matters discussed in this ruling. The actual trial exhibit, however, included handwritten identifications of

various customers and other notations made by witnesses in the course of trial. On this map, RWS #1's customers are shown as squares and the City's customers are shown as circles; the City's 1975 and 1989 boundaries are shown as dashed lines; and RWS #1's water lines (in colors in the trial exhibit) are shown as solid lines with indications of their diameters in inches.

[Map Omitted In Printing]

All of RWS #1's easements for pipeline were acquired by agreements with landowners or municipalities: RWS #1 does not have the power to condemn rights-of-way or easements for its pipelines. Thus, nearly all of RWS #1's pipeline, when laid, ran through private rural land, roughly parallel to, but just outside, the 1975 city limits of Sioux Center, or roughly paralleled the 1975 city limits at a distance. In 1975, RWS #1's pipeline formed a rectangle around Sioux Center, and was contiguous to the city limits only for a short portion of Harrison Avenue/13th Avenue N.E. on the east, and a very short portion of Grant Avenue/13th Avenue N.W. on the west. However, since the City's annexation of 1,620 acres in 1989, RWS #1's pipeline runs along, partly inside and partly outside, the eastern city limit, the northern city limit, and a slightly longer portion of the western city limit than was the case in 1975.[4] On the south, RWS #1 has an 8-inch transmission line from its Treatment Plant No. 2 to the west of the City to its reservoir to the east of the City, built in 1988, that runs east-west for most of its course,

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[4] The majority of the City's 1989 annexation was to the east, north, and south, with only a small area just south of 390th Street/7th Street N.W. added to the "panhandle" on the west.

partly through the annexed area where it formerly paralleled the 1975 city limit, and partly parallel *to, but outside*, of the new 1989 boundary in an area along 410th Street/20th Street S.E. east of U.S. Highway 75. The City has never condemned, disturbed, or interfered with the function of any portion of RWS #1's pipeline that eventually came within City limits, although RWS #1 contends that the utility of some of its lines has been impaired because they can no longer serve additional customers.

The undisputed testimony at trial, from witnesses for both RWS #1 and the City, was that the 8-inch water line RWS #1 installed in 1988 adjacent to the City's 1975 southern boundary was intended to be and in fact is used solely or strictly for transmission of water from RWS #1's treatment plant to the west of the City to its reservoir to the east, not as a service line. RWS #1 contends that this line could, however, be used to enhance pressure and flow for fire protection, and that it could be tapped for fire hydrants, a matter the court need not resolve. However, in the same trench with the 8-inch dedicated transmission line, RWS #1 also laid a 2-inch service line for a short distance crossing and then running east and west of U.S. Highway 75, a fact not presented in the summary judgment record. This service line was connected to a pre-existing 3-inch service line, laid in about 1975 or 1976, not to the 8-inch dedicated transmission line laid in 1988. The City protested the installation of this 2-inch service line, at the time it occurred, as contrary to an agreement between the parties that only a transmission line would be laid in 1988 along 410th Street. As a practical matter, this 2-inch service line does not now and never has serviced any customers. Jean Still, the manager of RWS

#1 testified that the 2-inch service line was laid at the same time as the 8-inch dedicated transmission line, because of the expense and difficulties of obtaining permits and making installations when a water line crosses a highway, such as U.S. Highway 75. The 2-inch service line has never serviced customers, because adjacent territory RWS #1 anticipated servicing from it was annexed by the City in 1989, a year after the line was built.

The RWS #1 pipeline system is designed to provide only potable running water for rural customers, including residences, business, and farmsteads. It is not designed specifically for, and has never been required by state or federal regulations or permit-issuing or funding agencies to provide, fire flow protection. Experts for both parties agreed, and the court finds, that RWS #1 was not required to provide fire flow protection by any existing regulations of any governing entity. Indeed, Jean Still testified that she had not heard much about fire flow until this litigation, although she testified that, if required, she believed the RWS #1 system could provide adequate fire flow either now or within a reasonable time with some modifications. There is no evidence that at any time RWS #1 has failed to provide potable running water to any customer or service area nor is there any evidence that any customer or regulating body has ever complained that RWS #1 did not provide such water at an adequate pressure.

The court therefore turns to the circumstances under which certain customers were transferred between RWS #1 and the City or were connected to City water instead of the RWS #1 system. This review begins with customers

inside the City's 1989 city limits, then turns to customers outside of the City's 1989 limits.

b. Existing customers inside the 1989 city limits

Relatively few customers brought within the city limits by the 1989 annexation actually changed from RWS #1 water service to City water. RWS #1 has retained fourteen pre-existing customers who now lie within the City's 1989 city limits. The City has not solicited nor asserted a right to serve any of these customers. However, in 1991, during the period when RWS #1 was not indebted to the United States, RWS #1 "sold" five customers to the City as the result of arm's-length negotiations. Those five customers included Marlin Altena, Cornie DeVos, and Norman Sneider, all located just within the southwest corner of the "panhandle" on the west side of the City, outside of the 1975 city limit, but within the 1989 city limit. The remaining two customers in this group of five were Dr. Daryl J. Funk and Dr. C.M. Bleeker, both located on the east side of the City, south of 390th Street and west of Harrison Avenue, in an area around which the 1975 city limit made a "jog," but within the 1989 city limit. These five customers were disconnected from RWS #1 service in May and June of 1991, and the City made payment of $2,815.35 to RWS #1 for these customers on July 8, 1991.

Another customer within the City's 1989 boundaries but serviced by RWS #1 was the subject of a "trade" between the City and RWS #1. That customer is Vande Berg Scales, which had been a customer of RWS #1 since

1977. The Vande Berg Scales property was in a small square of territory in the "panhandle" on the west side of the City to the north of 390th Street that was not within the City's 1975 city limits, but which was annexed in 1989.[5] After annexation, RWS #1 continued to serve Vande Berg Scales until 1994, when the proprietor expressed an interest in changing to City water, because City water was cheaper. By this time, RWS #1 was re-indebted to the FmHA. The other customer involved in the "trade," Tom Sandbulte, was building a home to the east of the City's 1989 city limits just north of 400th Street/9th Street S.E. and east of Harrison Avenue, *i.e.*, outside of the city limits. At this time, the City was still asserting – erroneously, this court held on summary judgment – that it had an exclusive right to serve customers within two miles of its city limits. Several properties in the area where Mr. Sandbulte was building his home were already serviced by RWS #1, but the City asserted a right to serve Mr. Sandbulte's new home. RWS #1 – acting under the same misapprehension as the City – had made a practice of acknowledging the City's claim to a two-mile exclusivity zone at least to the extent of asking the City which entity should serve water customers in that zone, and did so in Mr. Sandbulte's case. The parties worked out a deal whereby RWS #1 traded an apparently dissatisfied existing customer within the city limits, Vande Berg Scales, to the City for the "right" to serve a new customer outside of the city limits, Mr. Sandbulte.

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[5] The parties agree that the location of Vande Berg Scales is incorrectly shown on Exhibit 114A as outside of the square of territory referred to above, when it is in fact inside that square.

RWS #1 did not obtain FmHA approval for such a trade.[6] Thus, since 1994, Vande Berg Scales has obtained its water service from the City, and Tom Sandbulte has obtained his water service from RWS #1.

c. New customers inside the 1989 city limits

"New" customers within the 1989 city limits who were connected to City water instead of RWS #1 service were the following, beginning in the north and moving clockwise around the City: "Vande Berg Chicken," south of 380th Street/20th Street N.E.; Mr. Van Clyde and Mr. Horstman, just west of Harrison Avenue near Dr. Funk and Dr. Bleeker; Chuck Gue and an unidentified customer just north of 410th Street/20th Street S.E. near the southeast corner of the City's 1989 boundaries; Mr. Vermeer, Mr. Wichers, and Mr. Raak, just south of 410th Street/20th Street S.E. and east of U.S. Highway 75; and Mr. Byker, south of the Vermeer-Wichers-Raak group and near RWS #1's 3-inch service line running south from the city parallel to U.S. Highway 75.

Although Mr. Vande Berg obtained water for his residence from RWS #1, he obtained water from the City for his chicken houses after the 1989 annexation. The record is silent as to whether Mr. Vande Berg had previously obtained water for his chicken houses from RWS #1. Thus, RWS #1 has failed to prove that it "lost" an

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[6] The court will consider in its legal analysis whether such approval was required and the significance of failing to obtain such approval if it was required.

existing customer as the result of annexation and service to "Vande Berg Chicken" by the City.

The record, including the testimony of Jean Still, shows that Mr. Van Clyde and Mr. Horstman "came on" to City water service after RWS #1 "sold" the right to serve the nearby properties of Drs. Bleeker and Funk to the City. Again, the record is silent as to whether Mr. Van Clyde and Mr. Horstman had previously obtained water from RWS #1. Thus, RWS #1 has failed to prove that it "lost" existing customers and the court finds instead that these were "new" customers within the City's 1989 limits.

Jean Still testified that Mr. Gue and the unidentified customer "could have been" RWS #1's customers, apparently because they were located near RWS #1's 3-inch service line, "if [the City] hadn't annexed out there." These customers, however, were also within the City's 1989 city limits at the time they sought service. The same applies to Mr. Vermeer, Mr. Wichers, Mr. Raak, and Mr. Byker, all of whom, it appears from the record presented at trial, only sought water service after the 1989 annexation, and then obtained service from the City. Thus, RWS #1 has failed to prove that it "lost" existing customers and the court finds instead that these were also "new" customers within the City's 1989 limits.

d. Customers outside the 1989 city limits

Turning to customers outside of the City's 1989 limits, although the City's waste water treatment plant was built after 1989 outside of its city limits, RWS #1 does not assert that it ever intended or expected to service that

plant as a customer. The City has always provided potable water to the waste water treatment plant. The court concludes that service of potable water to the City's waste water treatment plant is not in dispute.

The 2.88 acres the parties agree was annexed on October 1, 1990, is the property known throughout this litigation as the "Carriage House" property, on which stands a group of apartments. The "Carriage House" property lies just to the east of Harrison Avenue and to the south of 390th Street. It was sold for development by Mrs. Sneller, and is the southernmost of the three "Sneller" properties at issue in this litigation. The City has always provided water service to the Carriage House. At the time of annexation and the commencement of City water service to the Carriage House, RWS #1 was not indebted to the United States. The middle of the "Sneller" properties still belongs to Mrs. Sneller, although she built a new house on the property in 1994 and the parties dispute who had the right to serve that new residence. Mrs. Sneller's original residence was never served by RWS #1 – it was in fact serviced by the City – and her new residence is also served by the City. Unlike the Carriage House property, the City commenced water service to Mrs. Sneller's new home at a time when RWS #1 was again indebted to the United States. This "Sneller" property is the 0.41 acres north of the City's 1990 annexation that the parties agree was annexed in March of 1996, at a time when RWS #1 was indebted to the United States. The northernmost of the "Sneller" properties is a property sold to Mr. Vander Vegt. The Vander Vegt property is 2.22 total acres annexed by the City on October 6, 1997. Mr. Vander Vegt began receiving water service from the

City after annexation at a time when RWS #1 was indebted to the United States. The parties do not dispute that RWS #1 has service lines available to serve all three of these "Sneller" properties, although the City is currently serving all three.

The remaining customers in dispute outside of the City's 1989 city limits are the residents of the Byl Subdivision, which, as noted above in the recitation of the parties' stipulation of facts, was annexed by the City in December of 1995. The City installed an 8-inch water line to the Byl Subdivision and began providing service there in 1996 even though RWS #1 has a 5-inch service line that crosses the front of each of the four lots in the subdivision. The court finds that the Byl Subdivision was annexed, and the City began providing water service there, at a time when RWS #1 was indebted to the United States.

II. LEGAL ANALYSIS

(including some further findings of fact)

The court's legal analysis must be made in several phases, sometimes coupled with outcome determinative findings of fact. In the first phase, the court must consider RWS #1's implied invitation to reconsider its summary judgment ruling. Contrary to the summary judgment ruling, RWS #1 appears to urge the court to find that RWS #1 is entitled to the protection of § 1926(b) from loss of customers resulting from the City's 1989 annexation, and hence can claim as protected territory the area between the City's 1975 and 1989 city limits. Next, the court must consider whether various customers fall

within RWS #1's federally-protected service area, in light of both RWS #1's legal right and physical ability to serve those customers. The court must then consider RWS #1's state-law claims of tortious interference with prospective business advantage, conversion of property, and inverse condemnation. Finally, if RWS #1 prevails on any of its claims, the court must consider the appropriate remedies.

A. Reconsideration Of The Summary Judgment Ruling

As mentioned above, RWS #1 appears to invite the court, at least implicitly, to reconsider its summary judgment ruling and find that RWS #1 is entitled to the protection of § 1926(b) from loss of customers resulting from the City's 1989 annexation. This invitation comes from RWS #1's post-trial brief, calling the court's attention to the decision of the Fourth Circuit Court of Appeals in *Payne v. Federal Land Bank of Columbia*, 916 F.2d 179 (4th Cir. 1990), and the briefs on appeal to the Fourth Circuit Court of Appeals of the decision of the district court in *Bell Arthur Water Corp. v. Greenville Utilities Comm'n*, 972 F. Supp. 951 (E.D.N.C. 1997). RWS #1 asserts that Payne and arguments premised upon it demonstrate that RWS #1 was entitled to the continued protection of § 1926(b) even after it bought out its notes to the FmHA in 1988 until it became re-indebted to the United States in 1992, the period the court has determined was a hiatus in RWS #1's § 1926(b) protection. The invitation for reconsideration comes as well, and less directly, from RWS #1's continued reference to the area between the City's 1975

city limits and its 1989 city limits as the "disputed territory," when this court's summary judgment ruling specifically identified the remaining disputed territory as that *outside* of the City's 1989 city limits. At trial, RWS #1 presented copious evidence, much of which would otherwise be irrelevant, at least to RWS #1's federal claim, concerning customers and service lines between the City's 1975 and 1989 city limits, including anticipated new customers in that area, apparently in support of RWS #1's contention that it was entitled pursuant to § 1926(b) to serve all customers between the old and new city limits, as well as those outside of the 1989 city limits. The court will indulge RWS #1's desire for reconsideration only briefly.

1. Payne and the Bell Arthur briefs

RWS #1 argues that the *Payne* decision teaches that the focus of statutory construction is the conference committee report and that the decision also explains a federally created right of first refusal under the Agricultural Credit Act of 1989 (the 1989 ACA). However, the court finds that the *Payne* decision is at best only marginally relevant. The provision of the 1989 ACA in question in *Payne* was 12 U.S.C. § 2219a, which provides that where agricultural real estate is acquired by a federal institution as a result of a loan foreclosure, the land is subject to a right of first refusal of the previous owner to repurchase or lease the property. *See Payne*, 916 F.2d at 180 & n.1. Thus, the provision in question has nothing whatever to do, in the first instance, with what RWS #1 describes as a

"right of first refusal" of an indebted rural water association to buy out its bonds with the United States pursuant to the 1987 ACA and 1986 OBRA "Buy Out Program" of FmHA loans or the interpretation of the statutory provisions pertinent to the buy out program at issue in this case, subsections (f) and (g) of 7 U.S.C. § 1929a note. Nor is the language of the statute at issue in *Payne* comparable in some way to the language of the provisions of subsections (f) and (g) of 7 U.S.C. § 1929a note, such that comparison of the language of the two statutes suggests an interpretation of the statute at issue here that is different from this court's interpretation offered upon cross-motions for summary judgment.

Furthermore, the *Payne* decision does not establish that the "focus" of statutory interpretation is the conference committee report, as RWS #1 suggests. Rather, the court in *Payne*, as did the court in this case, noted that "the origin of any statutory construction is the statute itself." *Payne*, 916 F.2d at 181; *and compare Rural Water Sys. #1*, 967 F. Supp. at 1516-17 ("When the language of the statute is plain, the inquiry also ends with the language of the statute," quoting *United States v. Ron Pair Enters., Inc*, 489 U.S. 235, 241 (1989)). As did this court in construing subsections (f) and (g) of 7 U.S.C. § 1929a *note*, the Fourth Circuit Court of Appeals in *Payne* found that the language of the pertinent subsections of 12 U.S.C. § 2219a were "clear and need[ ] no construction." *Id.*; *and compare Rural Water Sys. #1*, 967 F. Supp. at 1517-20.

Furthermore, like this court, the Fourth Circuit Court of Appeals found that if plain meaning of the statutory language "were not enough, . . . the legislative history bolsters [the court's] conclusion." *Id.* at 182; *and compare*

Rural Water Sys. #1, 967 F. Supp. at 1521-22. In this regard, the Fourth Circuit Court of Appeals did observe that "[t]he part of legislative history which is given the most weight is the conference report." *Id.* Hanging its hat on this observation, RWS #1 points, in the *Bell Arthur* briefs, to a portion of the Joint Explanatory Statement of the Committee of Conference concerning subsections (f) and (g) of 7 U.S.C. § 1929a *note* – a portion to which RWS #1 failed to draw this court's attention at the summary judgment phase of these proceedings – in which the committee observed that "[t]he Senate amendment will provide that Section 306(b) of the Consolidated Farm and Rural Development Act must be applicable to all notes or other obligations sold or intended to be sold under Section 1001. (Sec. 1001(a).)." Joint Explanatory Statement of the Committee of Conference, 3097-8. RWS #1 also points to the House Conference Report No. 100-190, which states that "[t]he Conferees intend that issuers of notes and obligations being sold under the requirement of the Budget Reconciliation Act of 1986 be given an opportunity to purchase any unsold obligations and notes for 30 days prior to the announcement of any public offerings." House Conf. Report No. 100-190.

2. The import of Payne and legislative history

However, this court has already considered the import of virtually identical pronouncements from the legislative history, those of Senator Boren, the sponsor of the amendment that became subsection (g), and has concluded that nothing in them is clearly supportive of RWS #1's interpretation of subsection (g) or plainly contrary to

the court's. *See Rural Water Sys. #1*, 967 F. Supp. at 1522-23. RWS #1's new authority and new arguments simply do not require a different result. Rather, as the court concluded on cross-motions for summary judgment, relying on the plain meaning of the statutory provisions in question and the legislative history, subsection (g) of 7 U.S.C. § 1929a note does not extend § 1926(b) protection to an issuer who has bought out its notes from the United States pursuant to the 1986 OBRA and 1987 ACA, thereby extinguishing its notes, and who consequently is no longer indebted to the United States. *See id.* at 1523 & 1534-35.

B. The Scope Of RWS #1's § 1926(b) Protection

The second phase of the court's legal analysis requires the court to consider whether various customers fell within RWS #1's federally-protected service area, in light of both RWS #1's legal right and physical ability to serve those customers. This phase of the court's analysis begins with the import of the court's summary judgment ruling, as reaffirmed above.

1. The import of the court's summary judgment ruling

Because the court finds no reason to retreat from its statutory interpretation and consequent conclusions on summary judgment, the court must reiterate the impact of its conclusions upon the decisions remaining to be made at trial. RWS #1 lost the protections of § 1926(b) when it bought back its notes in 1988 and did not regain such protections until RWS #1 again became indebted to

the United States on July 1, 1992. Consequently, RWS #1 cannot state a claim that the City violated § 1926(b) when it annexed portions of the supposedly disputed territory in 1989, and made further annexations prior to July 1, 1992, because RWS #1 simply had no protection of § 1926(b) to assert against that annexation.

In other words, by serving any new customers within the City's boundaries as of July 1, 1992, the City did not – and will not – violate § 1926(b). Nor did purchases of customers within the City's boundaries as of July 1, 1992, while RWS #1 was not indebted to the FmHA, in any way violate § 1926(b). RWS #1 simply cannot assert that any part of its federally-protected service area after July 1, 1992, includes any area within the City's boundaries as of that date except for customers within that area that RWS #1 was already serving on that date.

More specifically, the court finds that RWS #1 has failed to prove that after July 1, 1992, it lost any customers it was already serving within the City's boundaries on July 1, 1992, *with the exception of Vande Berg Scales*, which will be discussed separately below. The record shows that RWS #1 has retained fourteen such customers. The City has not solicited nor asserted a right to serve any of these fourteen customers and therefore has not attempted to encroach upon or "curtail" RWS #1's existing service area as to these customers in violation of § 1926(b). The court finds that the City's notice to customers of their annexation by the City with the addresses or phone numbers to contact if City services are desired does not constitute "solicitation" of RWS #1's customers or threatened "curtailment" of RWS #1's service area. In

point of fact, no "curtailment" occurred, because no existing customers, apart from Vande Berg Scales, changed to City water service.

RWS #1 has no claim for loss of five existing customers within the City's 1989 city limits – Marlin Altena, Cornie DeVos, Norman Sneider, Dr. Daryl J. Funk, and Dr. C.M. Bleeker – that it "sold" to the City in 1991 during the hiatus in its § 1926(b) protection. The court concludes that this sale was an arm's-length transaction between parties who, at that time, were not subject to any legal impediment that would have prevented such a sale.

Nor does RWS #1 have any claim for loss of "new" customers within the City's 1989 limits – "Vande Berg Chicken," Mr. Van Clyde, Mr. Horstman, Chuck Gue, an unidentified customer just north of 410th Street/20th Street S.E. near the southeast corner of the City's 1989 boundaries, Mr. Vermeer, Mr. Wichers, Mr. Raak, and Mr. Byker. At the time these customers were added by the City, the City, not RWS #1, had the legal right to serve them, because they were within the City's limits. Therefore, as to these customers, RWS #1 cannot satisfy the first requirement for § 1926(b) protection, a legal right to serve. *See Rural Water Sys. #1*, 967 F. Supp. at 1524 & 1527 & 1535.

Nor did RWS #1's new indebtedness on July 1, 1992, somehow revivify its federal protection for service area within the City's limits as of July 1, 1992, protection RWS #1 had lost owing to annexations, sales, or trades while it was *not* indebted to the United States. This is so, again, because as to such customers and service area, RWS #1

cannot satisfy the first requirement for § 1926(b) protection, a legal right to serve. *See Rural Water Sys. #1*, 967 F. Supp. at 1524 & 1527 & 1535. Rather, the legal right to serve such customers lay (and lies) with the City. Proximity of pipelines or "pipe in the ground" cannot "trump" loss of a legal right to serve. *See id.* at 1526. Therefore, RWS #1 has no claim for any prospective customers within the City's limits as those limits existed on July 1, 1992. Consequently, much of RWS #1's evidence of supposed acts of curtailment by the City *within the City's boundaries of July 1, 1992*, is irrelevant, because there was no service area of RWS #1 within those boundaries to be curtailed beyond RWS #1's existing customers, all but one of which, Vande Berg Scales, RWS #1 has retained.

2. *The Vande Berg Scales trade*

The "trade" of Vande Berg Scales for Tom Sandbulte, although an arm's-length transaction between the parties like the "sale" of other customers discussed above, occurred in a significantly different factual and legal context. This "trade" occurred in 1994, when RWS #1 was again indebted to the United States, and thus constitutes loss of an existing customer, Vande Berg Scales, who *was* part of RWS #1's federally-protected service area. The bargain was a bad one, because the City actually had no right to serve Tom Sandbulte, whose new residence was outside the City's limits, while RWS #1 got nothing more than it was already entitled to and gave away something it was entitled to keep. However, the value of the bargain is not what determines its legality or illegality under

§ 1926(b). The question is whether RWS #1 could bargain away an existing customer while it was indebted to the United States.

The City contends that RWS #1 is estopped by its bargain to complain of the transfer of Vande Berg Scales to City water service. The City contends further that such a trade was permissible under § 1926(b), because a "customer" is not a "facility" that an indebted association is prohibited from transferring or encumbering without written consent of the United States pursuant to 7 C.F.R. § 1942.17(n)(2)(xii).[7] RWS #1 contends that such estoppel would be contrary to public policy, and thus stands as no bar to its assertion of illegal curtailment resulting from the trade, citing *Jennings Water, Inc. v. City of North Vernon*, 895 F.2d 311, 314 (7th Cir. 1989).

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[7] The regulation to which the City cites provides, in pertinent part, as follows:

> (2) Loan resolutions. Loan resolutions will be adopted by both public and other-than-public bodies using Form FmHA or its successor agency under Public Law 103-354 1942-47, "Loan Resolution (Public Bodies)," or Form FmHA or its successor agency under Public Law 103-354 1942-9, "Loan Resolution (Security Agreement)." These resolutions supplement other provisions in this subpart. The applicant will agree:
>
> * * *
>
> (xii) Not to sell, transfer, lease, or otherwise encumber the facility or any portion thereof or interest therein, and not to permit others to do so, without the prior written consent of the Government.

7 C.F.R. § 1942.17(n)(2)(xii).

The *Jennings Water* decision is the only one the court and parties have identified that addresses directly the impact of estoppel on § 1926(b) protection in a pertinent way. In *Jennings Water,* CSL, a private, not-for-profit utility that had obtained water from Jennings Water, Inc., asserted that Jennings Water was estopped to assert § 1926(b) protection from loss of CSL as a customer, because Jennings Water had not objected when CSL announced that it would purchase water elsewhere. *Jennings Water, Inc.*, 895 F.2d at 313 & 316. The Seventh Circuit Court of Appeals concluded, first, that CSL had at best a weak case for estoppel under the "private party litigation model," because CSL could not show a reasonable belief that § 1926(b) protection would not be asserted by the FmHA against its purchase of water from a source other than Jennings Water. *Id.* at 316-17. However, the court ultimately concluded that estoppel, in these circumstances, was not available because it would violate public policy. *Id.* at 317-18. The court's succinct conclusions were as follows:

> In this case, application of equitable estoppel based on Jennings' actions would allow a private contract for the sale of water between North Vernon and CSL effectively to trump section 1926(b). As discussed *supra,* the primary beneficiaries of section 1926(b)'s ban on association service curtailment are not the associations themselves, but rather, the FmHA and the individual rural consumers who would not have inexpensive and reliable water service without FmHA-supported rural water associations. *See generally [City of Madison, Miss. v.] Bear Creek Water [Ass'n, Inc.],* 816 F.2d [1057,] 1060 [(5th Cir.1987)]. Accordingly, Jennings' section

> 1926(b) action for injunctive relief cannot be barred by equitable estoppel.

Jennings Water, Inc., 895 F.2d at 317-18.

This court's agreement with the principle established in *Jennings Water* is somewhat tepid in light of the facts of this case. First, although the party asserting estoppel in *Jennings Water* had at best a "weak" claim for estoppel, here, the City has an express agreement, not just lack of objection, to a specific trade of customers to resolve a dispute. Furthermore, the court agrees that the pertinent regulation, at least by its plain meaning, does not encompass a "customer" within the meaning of a "facility," and thus the City could reasonably have believed that such a trade was permissible without FmHA approval under the regulations and § 1926(b). Nonetheless, the overriding justification for the conclusion of the Seventh Circuit Court of Appeals that estoppel is no bar – that the public policy behind § 1926(b) should not be "trumped" by a private contract – is still persuasive here, and that principle bars application of estoppel at least where the public entity that is one of the primary beneficiaries of § 1926(b), the FmHA, is not a party to the agreement upon which the claim of estoppel is founded. Therefore, although the regulation cited by the City may not bar such a transfer of customers, the principles behind § 1926(b) do, at least where the FmHA is not a party to the agreement to transfer.

The upshot of this conclusion is that the City's acquisition of Vande Berg Scales, an existing customer of RWS #1 although located within the City's limits, at a time when RWS # 1 was indebted to the United States, and

thus could claim an existing customer as part of its protected service area under § 1926(b), constituted a "curtailment" of RWS # 1's service area in violation of § 1926(b).

3. *Service and encroachment outside the 1989 boundary*

The remaining questions are the extent of RWS # 1's protected service area *outside* of the City's limits as of July 1, 1992, and whether curtailments or threatened curtailments of RWS # 1's service area occurred in violation of § 1926(b) *after* July 1, 1992, when RWS # 1 again became indebted to the United States. The question of the extent of RWS # 1's protected service area *after* July 1, 1992, turns on RWS # 1's physical ability to serve its asserted service area *outside* of the City's 1989 city limits, and outside any additional areas incorporated into the city before July 1, 1992, and the City's encroachment upon any protected service area. The court has already determined, also in its summary judgment ruling, that RWS # 1 has the legal right to serve outside the City's limits as those boundaries existed on July 1, 1992, because the court held that the City could not assert a two-mile exclusionary zone *as against* RWS # 1 outside the City's limits pursuant to Iowa Code § 357A.2. The City has cited no other legal authority on its part superior to RWS # 1's to provide water service outside of the City's limits.

The customers in question, therefore, are any and all prospective customers outside of the City's limits as those limits stood on July 1, 1992 – essentially the 1989 city limits with a few other small annexations – as well as

existing customers including the three "Sneller" properties, and the residents of the Byl Subdivision. RWS # 1 argues that, as to each of these customers or group of customers, it had water lines through or adjacent to the properties – "pipe in the ground" – capable of providing service immediately or within a reasonable time, but the City curtailed that service by providing water instead. The City does not dispute that the Byl Subdivision and two of the three "Sneller" properties were annexed and received service from the City after RWS # 1 was again indebted to the United States. However, the City challenges the "adequacy" of the service available from RWS # 1 to these properties, on the basis of adequate capacity and pressure and on the basis of lack of fire protection. The City points out, further, that the Carriage House was annexed in 1990 when RWS # 1 was *not* indebted to the United States, and thus the City's service to the Carriage House was not a curtailment of RWS # 1's protected service area.

a. Matters of geography and timing

The court's consideration of whether the City has "curtailed" RWS # 1's protected service to these customers begins with matters of geography and timing: where are RWS # 1's "pipes in the ground" in relation to the properties in question, and when did the City annex the properties and/or begin providing water service to them in RWS # 1's stead. The question of "pipes in the ground" is easy, because RWS # 1 undeniably had service pipelines adjacent to or through each of these properties from as early as 1975 and certainly had such service lines in place on July 1, 1992. However, "pipes in the ground"

is not enough if questions of timing establish that RWS # 1 had no legal right to serve the properties in question as of July 1, 1992. *See Rural Water Sys. # 1*, 967 F. Supp. at 1524 & 1527 & 1535.

As to the Carriage House, the court agrees that this property was not part of RWS # 1's service area when RWS # 1 regained the protections of § 1926(b) on July 1, 1992. At the time of the City's annexation of the Carriage House on October 1, 1990, and the commencement of City water service to it, RWS # 1 was not indebted to the United States. Therefore, the City's acquisition of this customer was not a curtailment of RWS # 1's service area in violation of § 1926(b). Nor was RWS # 1's claim to service of the Carriage House revivified, although it had "pipe in the ground" adjacent to or through this property, when RWS # 1 again became indebted to the FmHA, because RWS # 1 then had no legal right to serve the Carriage House, which by then lay within the City's limits and was legally served by the City. *See Rural Water Sys. # 1*, 967 F. Supp. at 1524 & 1527 & 1535 (requiring that the indebted association have both a legal right and physical ability to serve disputed territory). Therefore, the City's water service to the Carriage House is not a curtailment of RWS # 1's protected service area.

The remaining "Sneller" properties – Mrs. Sneller's property and the Vander Vegt property – as well as the Byl Subdivision, however, were both annexed by the City and began to receive water service from the City *after* RWS # 1 became re-indebted to the United States, and thus they were in RWS # 1's protected service area, at least as a matter of geography and timing, when the City acquired them as customers. Mrs. Sneller, however, had

always received her water service from the City at her old house. City service to Mrs. Sneller's old house pre-dated the existence of RWS # 1. The complication is that Mrs. Sneller moved the old house to a new location on the same parcel of land, and built a new house, which again was connected to City water. The question is whether Mrs. Sneller's new house, on the same parcel of land, was therefore also by rights a City customer or, instead, a "new" customer outside of the City's limits and within RWS # 1's service area, as to which RWS # 1 could claim the protections of § 1926(b).

The record is silent as to whether the "old" residence, in its new location on the same tract of land, has any water service at all. However, the court finds that RWS # 1 has failed to prove that Mrs. Sneller's "new" house, apparently located where the "old" house formerly stood, is a different customer from her "old" house. Instead, the circumstance is the same as if the "old" house had burned down and been rebuilt. In such circumstances, there would be little question that Mrs. Sneller would be entitled to continue the utilities connections she had prior to the loss of the old house as the result of a calamity. In the alternative, because the City had always served the residential customer on the tract of land in question, the court concludes that the City retained the legal right to serve that residential customer on that tract of land, albeit at a new house, particularly when a new house was simply substituted for an old one, not added as an additional connection. Consequently, Mrs. Sneller's "new" house is not a "new" customer that RWS # 1 had a legal right to serve. Lacking such a legal right, RWS # 1 cannot assert that Mrs. Sneller's "new" house was within its

protected service area when the City re-initiated or continued water service to it. *See Rural Water Sys. # 1*, 967 F. Supp. at 1524 & 1527 & 1535.

The Byl Subdivision and the Vander Vegt property, however, were both clearly new customers outside of the City's limits as of July 1, 1992, when the City annexed and commenced water service to them, in 1996 and 1997, respectively. The question of the legality of the City's service to these properties therefore is not one of geography or timing, but one of adequacy of the water service RWS # 1 could have provided to them.

b. Adequacy of service

As mentioned above, the City challenges the "adequacy" of the service available from RWS # 1 to these properties on the basis of adequate capacity and pressure and on the basis of lack of fire protection. The court will take the latter contention first.

i. Fire protection. The City notes that "[m]uch of the evidence in this case centers on the question of whether Rural Water can provide water for fire protection," Defendant's Post-Trial Brief, p. 10, but nowhere has the City cited any authority whatsoever for the proposition that a rural water association must provide adequate fire protection to obtain the protections of § 1926(b), or even identified any binding obligation on RWS # 1 to provide fire protection as the result of federal, state, or local statutes or regulations. To put it quite bluntly, "fire protection" is a red herring.

Indeed, the only court to consider the question directly – in a decision not cited or distinguished by the City in pre- or post-trial briefing – has rejected the contention that provision of fire protection is a requirement for § 1926(b) protection of service area. In *Rural Water Dist. # 3 v. Owasso Utilities Auth.*, 530 F. Supp. 818 (N.D. Okla. 1979), the court also noted that, as here, "much time was expended and testimony elicited as to the adequacy of the Water District system for the purposes of fire protection." *Owasso*, 530 F. Supp. at 823. The court in *Owasso* dismissed the question even more bluntly than this court has:

> The Court finds that § 1926(b) of the Agricultural Credit Act, Title 7 U.S.C. § 1921 *et seq.*, was not enacted for the purposes of fire protection – it was enacted to provide means of securing a "safe and adequate supply of running household water." There is no evidence in the record that the Water District is not effectuating the purpose of the Statute with the implementation of its water system. . . .
>
> . . . There is nothing in the Act itself to preclude the Owasso Utilities Authority from maintaining a water line for the purposes of fire protection only. Section 1926(b) does not encompass such a purpose.

Owasso, 530 F. Supp. at 823; *see also North Shelby Water Co. v. Shelbyville Muni. Water and Sewer Comm.*, 803 F. Supp. 15, 23 (E.D. Ken. 1992) ("The adequacy of the water service North Shelby is presently able to provide, including fire protection, is irrelevant to a determination whether North Shelby is entitled to the protections of § 1926(b)," citing *Owasso*). Unreported decisions since

Owasso have also concluded that a protected association was not required to provide fire protection, but that a municipality could provide fire protection only to an area otherwise served by a protected association without violating § 1926(b). *See Glenpool Utility Serv. Auth. v. Creek County Rural Water Dist. No. 2*, 956 F.2d 277 (table opinion), 1992 WL 37327, *1 n.4 (10th Cir. 1992) ("It is clear that Glenpool has the right to provide fire protection in the area," citing *Owasso*); *Water Works Dist. No. II of Tangipahoa Parish v. City of Hammond*, 1989 WL 117849, *6 (E.D. La. 1989) (unpublished) ("Therefore, while the City will be enjoined from supplying water service to the areas as indicated in these findings and conclusions, the City shall have the right to maintain and use its water mains and pipelines for fire protection purposes.").

More generally, "[t]he overwhelming weight of authority is that the purpose of [§ 1926(b)] is to protect rural water service users' access to *clean, safe water*," *see Wayne v. Village of Sebring*, 36 F.3d 517, 529 (6th Cir. 1994) (emphasis added), *i.e.*, "a safe and adequate supply of running household water," *Jennings Water, Inc.*, 895 F.2d at 315 (quoting S. REP. NO. 566, 87TH CONG., 1ST SESS., reprinted in U.S. CODE CONG. & ADMIN. NEWS 2243, 2309 & 2305); *Bear Creek Water Ass'n, Inc.*, 816 F.2d at 1060 (also quoting the Senate Report). These decisions, and indeed the legislative history of § 1926(b), do not mention fire protection.

At oral arguments, the City contended that fire flow protection was nonetheless required for RWS # 1's service to be "adequate," because when the City annexed territory, the citizens in the annexed territory then had an expectation of water service meeting City standards,

including fire flow protection, which RWS # 1's system could not fulfill. This argument is unavailing for at least two reasons. First, the City simply has no fire flow standards in place that could be imposed upon RWS # 1 at annexation. Thus, the City cannot establish that citizens had an expectation of water service meeting a certain City standard for fire flow protection, when no such City standard exists. Second, such an argument clearly circumvents § 1926(b), which provides that "[t]he service provided or made available through any such association *shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation* or other public body." 7 U.S.C. § 1926(b) (emphasis added). If a municipality could displace a rural water system simply by annexing territory and declaring that the rural water system did not then meet some City standard for service in the annexed area, the protection of § 1926(b) would be illusory, because the association's service would be curtailed or limited solely by inclusion of the area within the boundaries of the municipality.

The evidence regarding fire protection is irrelevant to this case and any inadequacy of RWS # 1's system to meet fire protection demands, when it was required and designed to provide only potable running water for household use, stands as no bar to RWS # 1's assertion of § 1926(b) protection.

ii. Capacity, pressure, and storage. The asserted inadequacy of the capacity and pressure of, and storage facilities for water available to serve the few remaining disputed customers, the Byl Subdivision and the Vander Vegt property, is therefore the City's only contention that RWS # 1 cannot invoke the protections of

§ 1926(b) as to them. As to capacity and pressure, the court is more sympathetic to the contention that more than simply "pipes in the ground" is required to obtain § 1926(b) protection, if the pipes in the ground manifestly cannot serve present needs and there is no likelihood that adequate service could be provided within a reasonable time. *Cf. Bell Arthur Water Corp.*, 972 F. Supp. at 962 (rejecting the argument that the only appropriate judicial consideration is the proximity of the water association's lines to the disputed area, and concluding instead that the court should consider necessary alterations to meet demands and the financial ability of the association to make such alterations within a reasonable time).[8]

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[8] An unpublished decision is also in accord. In *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 1997 WL 835210 (E.D. Okla. 1997), the district court opined as follows:

> If the quality of the lines and the ability of those existing lines to adequately service the disputed area are not also crucial to establishing whether an association makes service available, an absurd result can easily be contemplated. An association could merely demonstrate that it has in place a line of an obviously insufficient capacity and still be afforded the protection of § 1926(b). In the meantime while the association may or may not build its lines to accomodate [sic] the demands of the disputed territory, the customers are left with inadequate water service to maintain their businesses with no assurance that adequate service will be restored. This Court must conclude that not only must a line be in place, but also that line must be capable of delivering water in sufficient quantities to service the disputed territory.

Pittsburg County Rural Water Dist. No. 7, 1997 WL 835210 at *6 (citing *Bell Arthur* in support of this conclusion, as well as this

However, the question is not whether objectively adequate service for all potential users can be provided immediately. As the court explained in the *North Shelby* decision,

> Resolution of questions as to the adequacy of water service to be provided is within the exclusive jurisdiction of the appropriate regulatory agencies, which in this case would include the PSC, and the local Planning and Zoning Commission. If North Shelby is incapable of providing the required level of service, the appropriate regulatory agencies are authorized to refuse to permit North Shelby to serve those areas. 7 U.S.C. § 1926(b) was not intended to make federal courts into regulatory agencies for rural water systems. As the legislative history for § 1926 indicates, the purpose of the FmHA loan program is to secure for rural residents "a safe and adequate supply of running household water." S. REP. NO. 566, 87TH CONG., 1ST SESS., Reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2243, 2309. As the evidence in this case clearly establishes, North Shelby has made such water service "available" to the subdivisions in question. Whether North Shelby can and should provide a greater level of water service is a decision entrusted to the authority of the appropriate state and local regulatory agencies. No agency has determined that North Shelby cannot or will not provide the required level of service.

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court's prior ruling in this case on the question of whether the 8-inch line across the southern part of the City was a dedicated transmission line or was available to service customers).

North Shelby Water Co., 803 F. Supp. at 23. The *North Shelby* court held that the proper question for the courts is whether the association seeking protection "is capable of providing water service to the subdivisions within a reasonable time after application for service." *Id.* at 22 (citing *Glenpool*, 861 F.2d at 1213); *accord Bell Arthur Water Corp.*, 972 F. Supp. at 963 (citing *North Shelby* for the proposition that the question is whether adequate service can be provided within a reasonable time or with only minor adjustments to the system).

When arguments over the adequacy of the RWS # 1 system to maintain minimum pressure during maximum fire flow conditions are discounted, and all of the evidence, including the opinions of experts for both parties, is weighed,[9] it is apparent that RWS # 1 is now providing adequate service, in terms of pressure and capacity, to the Vander Vegt property and the Byl Subdivision. Although the City posed hypothetical questions concerning the adequacy of service to the Byl Subdivision if that development had involved forty lots instead of four, there is no indication in the record that such a large development is currently contemplated in that area. Even if it was, the undisputed testimony of Jean Still is that RWS # 1 has the financial resources and resolve to provide adequate service to such a large development within a reasonable time of application, in light of the fact that such a development would be, at this point, a long way from groundbreaking, which would allow RWS # 1 a substantial period of time

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[9] The court does not reach the question of the admissibility of RWS # 1's "rebuttal" expert testimony, because that evidence need not be considered in reaching this conclusion.

to upgrade its system to meet the additional demand. Again, there is no evidence in the record that any customer or regulatory agency has ever complained that RWS # 1 is currently providing water with an inadequate flow or inadequate pressure anywhere in its system, let alone in proximity to the City, even if there are comparatively "low pressure" areas identified in the RWS # 1 system that RWS # 1 should address in its long term planning. Although the City's expert testified that RWS # 1's system does not meet storage capacity standards of the Iowa Department of Natural Resources (IDNR) "[i]n a system that does not provide fire service," Trial Transcript, pp. 640-41, the IDNR has not refused RWS # 1 any permits. The court will not be drawn further into questions that properly belong to regulatory authorities. *See North Shelby Water Co.*, 803 F. Supp. at 23.

RWS # 1 provides adequate service to the disputed territory within the meaning of § 1926(b) and pertinent regulations, as a matter of "pipes in the ground" and the actual capacity of those pipes to meet the needs of adjacent customers. Therefore, the City's connection of the Byl Subdivision and the Vander Vegt property constituted curtailment of RWS # 1's service area in violation of § 1926(b). Attempts by the City to provide service to other customers outside of the City's boundaries as they existed on July 1, 1992, would also violate or threaten to violate § 1926(b).

C. State Law Claims

Although RWS # 1 has prevailed in part on its federal claim of curtailment of its service area in violation of

§ 1926(b), the court must also consider RWS # 1's state-law claims, because, for example, those claims may reach a broader range of the City's conduct. Specifically, although RWS # 1 lacked any federal protection for its service area between 1988 and July 1, 1992, RWS # 1 seems to assert that the City's conduct during that hiatus in federal protection ran afoul of state law. RWS # 1's three state-law claims allege tortious interference with prospective business advantage, conversion of property, and inverse condemnation. The court will consider these claims in turn.

1. Tortious interference

This court recently considered the elements of a claim of tortious interference with a prospective business advantage in *King v. Sioux City Radiological Group, P.C.*, 985 F. Supp. 869 (N.D. Iowa 1997). In *King*, this court identified the elements of the tort as follows:

> 1. The plaintiff had a prospective [contract or business relationship] with a [third person].
>
> 2. The defendant knew of the prospective relationship.
>
> 3. The defendant intentionally and improperly interfered with the relationship by [set forth the particulars supported by the evidence].
>
> 4. a. The interference caused [the third person] not [to enter into or continue] the relationship [or]
>
> b. The interference prevented the plaintiff from [entering or continuing] the relationship.
>
> 5. The amount of damage.

King, 985 F. Supp. at 882 (citing Iowa Civil Jury Instructions, 1200.2, and citing generally *Nesler v. Fisher & Co., Inc.*, 452 N.W.2d 191, 199 (Iowa 1990); *Gordon v. Noel*, 356 N.W.2d 559, 563 (Iowa 1984); and *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799 (Iowa 1984)); *accord Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 283 (Iowa 1998) (identifying essentially the same elements of the tort); *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 438 (Iowa 1996) (same). Tortious interference with a prospective business advantage is a recognizable tort against a governmental subdivision, such as the City. *See Iowa Coal Mining Co.*, 555 N.W.2d at 436-37.

However, as both this court and the Iowa Supreme Court have observed, the element of intentional and improper interference requires that the tortfeasor be shown to have had as a purpose for its interference "to financially injure or destroy the plaintiff." *King*, 985 F. Supp. at 882 (citing *Burke v. Hawkeye Nat'l Life Ins. Co.*, 474 N.W.2d 110, 114 (Iowa 1991); *Nesler*, 452 N.W.2d at 199; *Page County Appliance Ctr., Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 177 (Iowa 1984); *Harsha*, 346 N.W.2d at 799; *First Med., Inc. v. Embassy Manor Care Ctr., Inc.*, 483 N.W.2d 14, 16 (Iowa Ct. App. 1992)); *accord Tredrea*, 584 N.W.2d at 283 (" 'Interference with a prospective contract is an intentional tort which requires a showing that the sole or predominant purpose of the actor's conduct was to financially injure or destroy the plaintiff,' " quoting *Willey v. Riley*, 541 N.W.2d 521, 526 (Iowa 1995)); *Iowa Coal Mining Co.*, 555 N.W.2d at 438 ("Element number three requires proof that the defendant intended to financially injure or destroy the plaintiff."). More specifically, " '[t]here must be substantial evidence of a predominant

motive by the defendant to terminate the contract for improper reasons.' " *King*, 985 F. Supp. at 883 (quoting *RTL Distrib., Inc. v. Batteries, Double S Batteries, Inc.*, 545 N.W.2d 587, 590 (Iowa Ct. App. 1996), in turn citing *Water Dev. Co. v. Board of Water Works*, 488 N.W.2d 158, 162 (Iowa 1992)). This is the point on which RWS # 1's proof as to this claim utterly fails.

The "predominant purpose" of the City's annexations in and after 1989 was simply not to drive RWS # 1 out of business; it was to draw contiguous areas within the City. It is far too great a stretch to draw an inference, let alone determine, from the legitimate exercise of eminent domain power to annex contiguous land that the City's goal was to destroy one competing utility that served a much larger area beyond the City's reasonably anticipated limits. *See King*, 985 F. Supp. at 883; *and compare Tredrea*, 584 N.W.2d at 284 (citing *Willey*, 541 N.W.2d at 527, for the proposition that if the defendant acts for two or more purposes, its improper purpose must predominate). Nor can the court conclude that any of the other actions by the City of which RWS # 1 has complained, such as mistaken assertion of a two-mile exclusivity zone outside of the City's limits, were somehow for the predominant purpose of destroying RWS # 1. *See id.* The record reveals, to the contrary, that the City had significant reasons to maintain RWS # 1 in existence, such as the contracts between the parties for water treatment and other joint uses of facilities, while assertion of the two-mile exclusivity zone and other actions of the City were simply to maintain what the City believed to be, albeit wrongly in some cases, its own rights. The City has made no attempt simply to condemn RWS # 1's facilities to put

them to the City's exclusive use. For these reasons, based on complete lack of proof on an essential element, the City is entitled to judgment in its favor on this claim.

2. Conversion

"The civil equivalent of a theft prosecution is an action for conversion." *Iowa v. Taylor*, 506 N.W.2d 767, 768 (Iowa 1993) (citing *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 247 (Iowa 1988)). This court also recently considered the nature and elements of a civil conversion claim. *See Hanson v. Hancock County Mem. Hosp.*, 938 F. Supp. 1419, 1438-39 (N.D. Iowa 1996). As this court explained,

> Under Iowa law, which is based on Restatement (Second) of Torts § 222A, "[c]onversion is the act of wrongful control or dominion over another's personal property in denial of or inconsistent with that person's possessory right to the property." *Ezzone v. Riccardi*, 525 N.W.2d 388, 396 (Iowa 1994) (citing *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 247 (Iowa 1988), and Restatement (Second) of Torts § 222A(1), at 431 (1965)), *cert. denied sub nom. Ezzone v. Hansen*, [514] U.S. [1108], 115 S.Ct. 1958 (1995); *McCray v. Carstensen*, 492 N.W.2d 444, 445 (Iowa Ct. App. 1992) (also citing *Kendall/Hunt*); *Larson v. Great West Cas. Co.*, 482 N.W.2d 170, 173 (Iowa Ct. App. 1992) (also citing *Kendall/Hunt*, but not § 222A of the Restatement). Thus, no conversion may be found where the exercise of control was not wrongful. *Larson*, 482 N.W.2d at 173 (citing *Williams v. Redinger*, 179 Iowa 615, 616, 161 N.W.

701, 702 (1917)). Furthermore, liability for conversion may only be imposed when the intentional and wrongful interference with the property is so serious that the actor may justly be required to pay full value. *Kendall/Hunt*, 424 N.W.2d at 247; *McCray*, 492 N.W.2d at 445; *Larson*, 482 N.W.2d at 174. Citing § 222A of the Restatement, Iowa courts list the following factors as appropriate to consider whether the interference is sufficiently serious to find a conversion:

> (a) the extent and duration of the actor's exercise of dominion or control;
>
> (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
>
> (c) the actor's good faith;
>
> (d) the extent and duration of the resulting interference with the other's right of control;
>
> (e) the harm done to the chattel;
>
> (f) the inconvenience and expense caused to the other.

Kendall/Hunt, 424 N.W.2d at 247; *McCray*, 492 N.W.2d at 445; *Larson*, 482 N.W.2d at 174.

Hanson, 938 F. Supp. at 1438-39. It appears that RWS # 1 asserts that the City has "converted" customers and prospective customers, at best intangible property rights, as well as physical facilities.

Considering the elements of a civil conversion claim and the evidence presented at trial, it is also clear that RWS # 1 cannot prevail on this claim. First, RWS # 1 has

failed to prove that the City's annexations, the conduct upon which RWS # 1's conversion claim in part relies, were "wrongful" as required for the conversion claim to lie. *See id.* The court concludes from the record presented here that the annexations were proper exercises of governmental power for legitimate governmental purposes. Thus, incidental interferences with RWS # 1's property rights as the result of annexation are not actionable as conversions. Although the City's reliance on the supposed two-mile exclusivity zone outside of the City may have been "wrongful," or at least erroneous, RWS # 1 has failed to prove that it actually lost, that is, that the City "converted," any customers as the result of assertion of that exclusivity zone. Rather, on each occasion that RWS # 1 approached the City to see which entity should serve an outlying customer, it appears that the City allowed RWS # 1 to serve that customer.

Yet, even supposing there was "wrongful" conduct by the City and that the conduct resulted in interference with RWS # 1's property rights, and supposing further than RWS # 1 has a property right in intangible property such as prospective customers as to which a conversion claim will lie, *see Hanson*, 938 F. Supp. at 1439 (identifying the limited kinds of "intangible" property interests to which a conversion claim can be applied), RWS # 1's conversion claim ultimately founders on the factors for weighing whether "the interference is sufficiently serious to find a conversion." *Id.* at 1438-39.

As to the first of these factors, the extent and duration of the actor's exercise of dominion or control, *see id.*, it is apparent that where the City has annexed property and served customers it was not entitled to serve, RWS #

1's displacement as the water service entity is permanent; however, the City's exercise of dominion and control over RWS # 1's physical facilities is nil. The City has never condemned, disturbed, or interfered with the function of any portion of RWS # 1's pipeline that eventually came within City limits and RWS # 1 maintains control, and runs water through, all of its facilities. As to the second factor, assertion of rights inconsistent with the claimant's, *see id.*, the City has indeed asserted a right to serve customers that is inconsistent with RWS # 1's asserted right to serve them, but again, the City has not asserted any right to physical control of RWS # 1's physical facilities, even where those physical facilities lie within the City's boundaries. Furthermore, the court cannot find but that the City's conduct was in "good faith," *see id.* (third factor), although the City's conduct was at times based on an erroneous assertion of statutory rights to an exclusivity zone this court has only just recently debunked.

Perhaps most persuasive to the court is the question of the extent and duration of the resulting interference with RWS # 1's right of control, the fourth factor in the analysis. *See id.* Although the City has effectively deprived RWS # 1 of all prospective customers within its boundaries, and RWS # 1's physical facilities are no longer useable to serve such prospective customers, *RWS # 1 retains a right to serve all customers outside of the City's boundaries and retains a right of control over all of its physical facilities, and still further those facilities remain fully useable to serve customers outside of the City's borders.* It is fruitless to complain, as RWS # 1 does, that the investment in facilities will not be fully realized, because RWS # 1

cannot serve customers on both sides of the City's boundaries, because that simply means the existing facilities will be sufficient to serve customers outside of the City's boundaries for a longer period of time. As a matter of common sense, and in light of the expert testimony concerning capacity of the RWS # 1 system, there is a finite number of taps that can be served off of RWS # 1's existing facilities. It matters not at all to the value of the investment in existing facilities whether those taps serve properties inside or outside of the City's boundaries. In short, the loss of more immediate gains in revenue from drawing upon growth of customers within the City's boundaries is offset by the longer period of time before an investment in additional facilities will be required to service new customers outside of the City's boundaries. Similarly, in those few locations where the number of properties that can be served off of an existing RWS # 1 line has been effectively "capped" by the City's annexation,[10] RWS # 1 had an obligation to serve the existing customers at the time they were added, pursuant to § 1926(b) and federal regulations, as customers who

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[10] Such locations include the following 2-inch service lines, beginning in the north and moving clockwise: the line parallel to U.S. Highway 75 serving two existing customers within the City's northern boundary; the line parallel to East 1st Street serving one customer inside the City's eastern boundary; and a 2-inch line servicing customers within the southernmost part of the City's 1989 boundaries just south of 410th Street/20th Street S.W. In addition, the 3-inch service line running south from 410th Street parallel to U.S. Highway 75, which serves only one customer within the City's 1989 boundaries, continues on south and is available to serve customers outside of the City's boundaries.

could legally and feasibly be served, without regard to whether there would be any more such customers served off the same line. One oddity is the 2-inch line installed parallel to the 8-inch transmission line, which now will never serve any customers. The conclusion as to this line, however, is ultimately no different, because Jean Still's testimony identifying the reasons for installing that line clearly demonstrated that RWS # 1 balanced the fact that the line was not immediately going to serve anyone against the difficulties of installing it across a federal highway on a later occasion if service in the area was ultimately needed. This testimony simply demonstrates that RWS # 1 accepted the gamble on the ultimate usefulness of the 2-inch line and its cost of installation sooner versus its cost if installed later, and lost on the gamble.

To complete the analysis of pertinent factors, the court cannot find that any "harm" has been done to RWS # 1's physical chattels. *See id.* (fifth factor). As to physical facilities, all remain operational and undisturbed by the City. The court recognizes that RWS # 1's intangible "chattels" have been "harmed" to the extent that RWS # 1's interest in such customers has been destroyed, but the court does not believe this "harm" to intangible interests outweighs the lack of harm to physical chattels. Furthermore, as to the inconvenience and expense caused to RWS # 1, *see id.* (sixth factor), the court is at a loss to discover in the record any real inconvenience or expense RWS # 1 has incurred as the result of the City's actions. Certainly, RWS # 1 has not been required to remove or reroute any of its water lines and there is no evidence presented that RWS # 1 has been put to any additional expense for any other reason. Jean Still further testified

that RWS # 1's ability to repay its loans and to fund operations and improvements has not been impaired.

For these reasons, the court concludes that RWS # 1 has failed to prove its "conversion" claim. The City is therefore entitled to judgment in its favor on this state-law claim as well.

3. *Inverse condemnation*

RWS # 1's last state-law claim is for "inverse condemnation." Again, as the basis for this claim, RWS # 1 seems to assert that both prospective customers and physical facilities have been "taken" without just compensation. "The term 'inverse condemnation' is a generic description of the manner in which a landowner recovers just compensation for a taking of a property owner's property when condemnation proceedings have not been instituted." *Iowa Coal Mining*, 555 N.W.2d 418, 431 (Iowa 1996); *Schaller v. Iowa*, 537 N.W.2d 738, 743 (Iowa 1995); *Bellon v. Monroe County*, 577 N.W.2d 877, 879 (Iowa Ct. App. 1998) ("inverse condemnation" is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted"). Although the court suggested that there might be a question as to whether RWS # 1's assertion of inverse condemnation was proper in light of finality and exhaustion requirements for such a claim articulated by the Iowa Supreme Court in *Bakken v. City of Council Bluffs*, 470 N.W.2d 34 (Iowa 1991), and more recently in *Iowa Coal Mining Co.*, 555 N.W.2d at 431-34, the court will assume finality and exhaustion requirements have been met,

because the court concludes that the claim cannot succeed on its merits.

"An essential element of inverse condemnation is that there is a taking of property." *Schaller*, 537 N.W.2d at 743; *Water Dev. Co.*, 488 N.W.2d at 160. The Iowa Supreme Court has explained further:

> A taking does not necessarily require a transfer of physical control over the property but there must be a "loss of some compensable interest." [*Water Dev. Co.*, 488 N.W.2d at 160]. A taking exists if there is a substantial interference with the use and enjoyment of the property. *Hunziker [v. Iowa]*, 519 N.W.2d [367,] 369 [(Iowa 1994)]. The character of the intrusion, however, and not the amount of damages determines whether a taking has occurred. *Phelps v. Board of Supervisors*, 211 N.W.2d 274, 277 (Iowa 1973).

Schaller, 537 N.W.2d at 743. In *Schaller*, the Iowa Supreme Court found a "taking," even though the owner was compensated for damages when the county acquired a road easement, because subsequent use of the road substantially deprived the property owner of the use and enjoyment of the property. *Id.* at 743-44.

The decision of the Iowa Supreme Court in *Water Development Company*, 488 N.W.2d at 160-61, is on point here. In that case, the City of Des Moines annexed part of Polk County southwest of the city in which *Water Development Company* (WDC), a private corporation, had previously been the sole supplier of water. *Water Dev. Co.*, 488 N.W.2d at 159. After annexation, the Des Moines Water Works replaced WDC as sole supplier of water for the area, but did not buy up WDC's existing facilities, instead

installing its own water system. *Id.* Further pertinent findings of fact were the following:

> At the time of the annexation, WDC served approximately forty-five customers in the annexed area. The water works now serves all of the customers in the annexed area, but presumably WDC continues to serve customers in the remainder of its territory.

Water Dev. Co., 488 N.W.2d at 159.

The Iowa Supreme Court rejected WDS's inverse condemnation claim, finding there had been no "taking." *Id.* at 160. The court observed that "[i]n this case, none of WDC's pipelines or other fixed assets have been seized or physically impaired, nor have there been any regulations imposed by the water works limiting WDC's use of the system." *Id.* Instead, the court found that "[w]hat has been lost to WDC is its status as the sole supplier of water to the residents of the area." *Id.* Ultimately, the court concluded that this loss was insufficient to support a "taking" claim:

> Here, WDC had no exclusive right to furnish water to the annexed area, nor did it have a right to be free from competition. Any "taking" of its business through lawful competition was not compensable as an inverse condemnation.

Water Dev. Co., 488 N.W.2d at 161.

Similarly, RWS # 1 had no "exclusive right" to furnish water inside the City's 1989 city limits, because at the time of annexation, RWS # 1's service to the annexed area was not protected by § 1926(b). RWS # 1 has even less to complain about than did WDC, because, unlike

WDC, RWS # 1 has maintained nearly all of the customers it previously had within the City's 1989 limits, *compare Water Dev. Co.*, 488 N.W.2d at 159 (WDC lost all of its customers within the annexed area), with the exception of customers "sold" in 1991 during the hiatus in RWS # 1's § 1926(b) protection and the subsequent "trade" of Vande Berg Scales in 1994, which this court has found did violate § 1926(b). However, even if the "trade" of Vande Berg Scales violated § 1926(b), it was not a "taking," because the exchange was voluntary and there was an agreement on the compensation RWS # 1 was to receive, the right to serve Tom Sandbulte. Like WDC, RWS # 1 retains all of the customers it had outside of the annexed area. *Compare Water Dev. Co.*, 488 N.W.2d at 159. Any "taking" of RWS # 1's customers by the City through lawful annexation and competition is not compensable as an inverse condemnation. *Id.* at 161.

Nor has there been any "taking" of RWS # 1's physical assets within the annexed territory, or anywhere else, because none of RWS # 1's pipelines or other fixed assets have been seized or physically impaired, and no regulations have been imposed by the City limiting RWS # 1's use of its system. *Compare id.* at 160. For essentially the same reasons the court could find no "conversion" of RWS # 1's physical assets, there has been no "taking" by the City of those assets. RWS # 1 has suffered no loss of use or enjoyment of its physical assets, *see Schaller*, 537 N.W.2d at 743 (defining a taking, in part, as interference with use and enjoyment of property), even if that use must be somewhat redirected to serve customers exclusively outside instead of inside and outside of the City's limits. RWS # 1 is making precisely the same use of its

facilities, to the same extent, as it was before any action by the City: it is serving rural water customers. The "character of the intrusion" upon RWS # 1's facilities resulting from redirection of use to customers on one side of the line instead on both sides is slight, at best. *Id.*

Therefore, the City is also entitled to judgment in its favor on RWS # 1's inverse condemnation claim.

D. Remedies

Because RWS # 1 has prevailed, to some extent, on its federal claim of curtailment in violation of § 1926(b), the court must consider the question of what remedies RWS # 1 is entitled to receive. RWS # 1 specifically seeks declaratory relief, creation of what it calls a "constructive trust" that would transfer the City's curtailing facilities to RWS # 1, and money damages in the amount of $11,339.00 as the value of each past, present, and future customer, as well as litigation costs pursuant to 42 U.S.C. § 1988. Presumably, RWS # 1 seeks some of these remedies in the alternative. RWS # 1 concedes, however, that it can find no case in which a court has awarded money damages for a violation of § 1926(b). The City, asserting it is entitled to prevail on all claims, has not offered contrary evidence or arguments on the remedies to which RWS # 1 might be entitled if it prevailed on any claim.

Plainly the parties are entitled to declaratory and injunctive relief defining their respective service areas, and prohibiting either from infringing or encroaching upon the other's, in light of this court's summary judgment ruling and the present ruling after trial on the merits. *See, e.g., North Alamo Water Supply Corp. v. City of*

San Juan, Tex., 90 F.3d 910, 917 (5th Cir. 1996) ("Section 1926(b) does not create or specify a remedy for the enforcement of violations, but an injunction has been the principal tool employed by the courts with which to enforce the statute and prevent violations," citing *Bear Creek Water Ass'n, Inc.*, 816 F.2d at 1059, and *Jennings Water, Inc.*, 895 F.2d at 315), *cert. denied*, ___ U.S. ___, 117 S.Ct. 586 (1996). The more difficult question is whether, in order to rectify the curtailment of RWS # 1's service area in violation of § 1926(b) as to the three customers or areas the court has identified – Mr. Vander Vegt, the Byl Subdivision (two existing customers currently served by the City), and Vande Berg Scales – the court should also award money damages pursuant to 42 U.S.C. § 1983, or order the disconnection of City water and reconnection of RWS # 1's service, or some combination of remedies.

RWS # 1 asserts that the *North Alamo Water Supply Corporation* decision also supports its claim for a "constructive trust," *i.e.*, transfer of improper City connections to RWS # 1. In that decision, the Fifth Circuit Court of Appeals wrote,

> The City argues that the district court abused its discretion when it ordered the City to relinquish the water service infrastructures to the Utility because the relief was unrequested and if granted would prejudice the City. Citing *International Harvester Credit Corp. v. East Coast Truck*, [547 F.2d 888, 891 (5th Cir. 1977),] the City insists that when the failure to demand the relief granted prejudices the opposing party, the district court abuses its discretion.
>
> *We conclude that in ordering the transfer of the infrastructures to the Utility, the district court did*

> *not abuse its discretion. Rule 54(c) vests district courts with broad discretion to fashion a remedy, even if the remedy awarded is not specifically requested in the prayer for relief.* Although we recognize that Harvester places some limits on the district court's discretion, those limits are modest indeed and clearly were not exceeded here. The law gives the Utility the exclusive right to provide water service to and within the disputed areas. We are under the impression that the developers of the subdivisions installed the infrastructures and ceded them to the City without charge. The infrastructures are indispensable to providing water service to the residents of the subdivisions now that the development is complete. Thus, unless the infrastructures are transferred, the Utility would not be able to provide efficient and economical water service, and the rights of the Utility that are validated here would be useless.

North Alamo Water Supply Corp., 90 F.3d at 918-19 (emphasis added). Although this court finds that it is not essential "infrastructures" that must be transferred in this case, but simply connections to specific customers, the *North Alamo Water Supply Corporation* decision is nonetheless instructive on the discretion of the court to remedy a violation of § 1926(b) by ordering the transfer of water service to the party who has the right, pursuant to § 1926(b), to serve particular customers. *See id.* This court also finds that, unless such a transfer is ordered, the rights of RWS # 1 that are validated here would be useless. *Id.* Therefore, the court will order the disconnection of City water service to Mr. Vander Vegt, any and all customers in the Byl Subdivision (only two of which

currently exist), and Vande Berg Scales, and the connection of these customers to RWS # 1.

Furthermore, the decision of the Fifth Circuit Court of Appeals is also instructive on the manner in which the court should accomplish the transfer. *See id.* at 917. Although the defendant city in that case complained that the court's injunction requiring transfer of service was not sufficiently specific to satisfy FED. R. CIV. P. 65(d), the Fifth Circuit Court of Appeals disagreed:

> [T]he City complains that the district court's judgment fails to satisfy the requirements of Rule 65(d). In the form of a laundry list of specious quibbles and rhetorical questions, the City urges that the injunction is vague, unclear, and imprecise. We find none of these flaws to be present. The injunction is sufficiently and reasonably detailed and specific to permit the transfer of water service from the City to the Utility. Transferring water service from the City to the Utility will be a relatively complicated logistical task, requiring a coordinated effort by both parties. The burdens of any disruption in service will fall more heavily on the residents than on the parties. *With an eye on these potential pitfalls, the district court instructed the City to continue uninterrupted water service until the Utility is prepared to commence service, then to cease providing water service immediately upon commencement of service by the Utility.* Although this order does not choreograph every step, leap, turn, and bow of the transition ballet, it specifies the end results expected and allows the parties the flexibility to accomplish those results. Like the district court, we trust that, despite their differences regarding the right to service the

> disputed areas, the parties will work together to achieve a smooth transition with no interruption in water service and a minimum of inconvenience to the residents of the disputed areas.

North Alamo Water Supply Corp., 90 F.3d at 917 (emphasis added). Although disconnection of City water and connection of RWS # 1 service in this case is unlikely to be "a relatively complicated logistical task," it will nonetheless involve "burdens of . . . disruption in service [that] will fall more heavily on the residents than on the parties." *Id.* Therefore, this court also will not attempt to "choreograph every step, leap, turn, and bow of the transition ballet," but will simply "specif[y] the end results expected": The City will be instructed to continue uninterrupted water service to the customers identified until RWS # 1 is prepared to commence service, then to cease providing water service immediately upon commencement of service by RWS # 1. *Cf. id.* Like the courts in *North Alamo Water Supply Corporation*, this court "trust[s] that, despite their differences regarding the right to service the disputed areas, the parties will work together to achieve a smooth transition with no interruption in water service and a minimum of inconvenience to the residents of the disputed areas." *Id.*

The court would deem it appropriate, despite the lack of other authority directly supporting a money damages award for violation of § 1926(b), to award such damages pursuant to § 1983 to compensate RWS # 1 for the period in which it was wrongfully deprived of the opportunity to serve the specified customers. However, there is a lack of proof as to what damages would be appropriate. The money damages calculation offered by

RWS # 1 is for $11,339.00 as the value of each past, present, and future customer for the twenty-year period of RWS # 1's indebtedness. However, this calculation does not address the different times at which specific "curtailments" occurred, that of Vande Berg Scales in 1994, the Byl Subdivision in 1996, and Mr. Vander Vegt in 1997, or their relative durations. Nor is the court able reasonably to ascertain from the calculations proffered what damages should be awarded for the more limited periods the court finds might be appropriate, from curtailment until reconnection. In light of this lacuna in the proof, and the lack of any authority directly supporting an award of money damages to remedy violations of § 1926(b), the court will award no money damages.[11]

The court also finds the factual predicates for any award of punitive damages have not been proved and no such damages will be awarded. Finally, the court will reserve for later consideration the appropriateness and amount of any award for litigation costs pursuant to 42 U.S.C. § 1988 until there has been a proper submission in support of such an award. *See* N.D. IA. L.R. 54.1 & 54.2.

III. CONCLUSION

Upon the hearing of all evidence and arguments of the parties, it is ordered, declared, adjudged, and decreed as follows:

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[11] RWS # 1 cannot properly claim money damages for the cost of connecting or reconnecting the customers the court will order transferred to it, because RWS # 1 would have incurred the expenses of connecting these customers if they had been allowed to connect them in the first place.

1. The service area of RWS # 1 in reasonable proximity to the City of Sioux Center that is protected by 7 U.S.C. § 1926(b) consists of those water customers of RWS # 1 that existed as of July 1, 1992, within the City's boundaries as of July 1, 1992, and all territory and all water customers outside of the City's boundaries as of July 1, 1992, excluding only those customers outside of those boundaries that the City was serving with water as of July 1, 1992, and the City's wastewater treatment plant. The City is enjoined from soliciting or connecting water customers within RWS # 1's service area so specified, or otherwise encroaching upon, or curtailing or limiting in any manner this service area during the term of RWS # 1's continued indebtedness to the United States.

2. RWS # 1 has no right or authority to serve customers within the boundaries of the City as those boundaries existed on July 1, 1992, with the exception of RWS # 1's customers existing within those boundaries as of that date.

3. The City's provision of water service to Mr. Vander Vegt, any and all customers in the Byl Subdivision, and Vande Berg Scales constitutes a curtailment or limitation of RWS # 1's protected service area in violation of 7 U.S.C. § 1926(b). The City is enjoined from continuing to provide water service to Mr. Vander Vegt, any and all customers in the Byl Subdivision, and Vande Berg Scales, and shall transfer such service to RWS # 1. The City is enjoined to allow and facilitate the connection of these customers to RWS # 1. The City is further enjoined to continue uninterrupted water service to the customers identified until RWS # 1 is prepared to commence service,

then to cease providing water service immediately upon commencement of service by RWS # 1.

4. The court finds in favor of the defendant City of Sioux Center on RWS # 1's claims of tortious interference with prospective business advantage, conversion of property, and inverse condemnation. RWS # 1 shall take nothing on these claims.

IT IS SO ORDERED.

DATED this 12th day of November, 1998.

/s/ Mark W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

RURAL WATER SYSTEM #1, an Iowa non-profit corporation,	)	
Plaintiff,	)	**Case Number: C95-4112MWB**
vs.	)	***JUDGMENT IN A CIVIL CASE***
CITY OF SIOUX CENTER, IOWA,	)	(Filed Nov. 12, 1998)
Defendant.	)	

[ ] ***Decision by Court.*** This action came before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

Judgment is entered in accordance with attached Memorandum Opinion and Judgment Regarding Trial on the Merits by Judge Mark W. Bennett dated November 12, 1998.

DATE: November 12, 1998

James D. Hodges, Jr.
Clerk

/s/ Julia K. Hoch
(By) Deputy Clerk

APPROVED AS TO FORM:

/s/ Mark W. Bennett
MARK W. BENNETT
District Court Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 98-4160/99-2005NISC

Rural Water System #1, an Iowa Non-Profit Corporation,	*	
Appellee,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
City of Sioux Center, Iowa,	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

March 7, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Cirucit